NO. 99

In the Supreme Court of the United States

October Term, 1928

J. F. LAWRENCE ET AL.,
Appellants,

vs.

ST. LOUIS-SAN FRANCISCO
RAILWAY COMPANY,
Appellee.

STATEMENT AND BRIEF OF APPELLEE.

This is the same case that was before this Court as No. 894, October Term, 1926 (*Lawrence* v. *St. Louis-San Francisco Railway Co.*, 274 U. S. 588). The former appeal was from the order of a three-judge court, granting a temporary injunction. This appeal is from the final decree of the same court, after appellants' motion to dismiss appellee's complaint had been overruled, and appellants had refused to plead further.

Statement.

We think it necessary to enlarge somewhat on the statement contained in appellants' brief, pages 1 to 7. As

appellants refused to plead further after the lower court had overruled their motion to dismiss our original and supplemental complaints, there can be no dispute regarding the facts on which the judgment of the lower court is based. These facts are stated in our original complaint, as amended, and our supplement thereto, and, of course, are admitted to be true by appellants. Briefly stated, these facts are as follows:

More than thirty years ago, the St. Louis & San Francisco Railroad Company built and acquired lines of railroad extending from the cities of St. Louis and Kansas City, in the State of Missouri, to Afton, in the State of Oklahoma, at which point said lines of railroad united and extended in a single line in a southwesterly direction into the State of Oklahoma and the cities of Tulsa and Sapulpa, in said State; and thereafter there were built lines of railroad extending south from said city of Sapulpa, into the State of Texas, to the city of Sherman, in said State. Owing to the fact that at the time of the construction of said lines of railroad, the railway company received a large volume of its business from the vicinity of the city of Sapulpa, and owing to the further fact that it appeared to those having to do with the construction of said lines of railroad at said times that the city of Sapulpa would become the business shipping center of its locality, the railway company located, built and constructed at the said city of Sapulpa, certain railroad shops and a division point on said lines of rail-

road; and said shops and division point have been maintained and operated in the city of Sapulpa up to the time of the filing of this suit. On the 1st day of November, 1916, the St. Louis-San Francisco Railway Company became the owner, by purchase, of the above named lines of railroad and railroad shops, and has since owned and operated the same. During the month of February, 1917, appellants, J. F. Lawrence and C. C. Taylor, appearing on behalf of themselves and the Chamber of Commerce of the city of Sapulpa, and the citizens of said city, filed complaint with the Corporation Commission of the State of Oklahoma, for the purpose of preventing appellee from removing its said shops and division point from the city of Sapulpa to the city of Tulsa, on its line of railroad. Thereafter, on the 15th day of February, 1917, the Corporation Commission of the State of Oklahoma issued its order temporarily restraining appellee from moving its said shops, or division point, as aforesaid. A partial hearing was had on this complaint, and an adjournment taken. During that adjournment the Legislature of the State of Oklahoma passed the following Act, now found at Sections 3482, 3483, 3484 and 3485 of the Compiled Oklahoma Statutes 1921:

> "3482. That no person, receiver, firm, company or corporation owning, operating or managing any line of steam railroad in this State shall be allowed to remove railroad shops or division points which have been located at any place in this State for a period of not less

than five years without previously securing the permission of the Corporation Commission to make such removal.

"3483. If, and when any such person, receiver, firm, company or corporation desires to remove any such railroad shops or division point described in Section One of this Act, it shall be his duty to file an application with the Corporation Commission setting forth the present location of such shops or division point and the reasons for such removal, and thereupon the Corporation Commission shall have full power and jurisdiction to entertain such complaint, but before hearing the same or making any order permitting such removal to be made, said cause shall be set down for hearing, not less than ten days' notice shall be given the city, town or village in which or at which such shops or division point have been maintained and after giving all parties interested a full and complete hearing in the premises the Commission may in its discretion permit or refuse such request for a removal.

"3484. When an application is filed before the Commission for the removal of terminals or car shops, as provided in Section Two, the Commission shall hear evidence on the relative efficiency and expense of handling traffic through the proposed terminal as compared with the present facilities, and shall consider all other facts and circumstances affecting the various interests involved. In determining the adequacy of the present facilities the Commission shall consider the same increased by an expenditure equal to an amount necessary to remove the same to the proposed location or an amount equal to the necessary expenditure to establish such facilities at the new location. It is hereby further provided that the Commission shall hear evidence and shall make a finding of fact as to the sanitary and habitable conditions of the proposed location with reference to whether the same would endanger the health of the employes of the applicant or the health of their families. If the Commission should find

that the sanitary or habitable conditions at the proposed location of said terminal facilities would endanger or injuriously affect the health of the employes of said applicant or their families, the Commission shall deny said application and order the said terminal facilities and car shops to remain at the present location.

"3485. On any such hearing, as provided in this Act, the presumption shall be against the removal and the burden of proof rest upon the applicant to show that such removal ought to be made."

Thereafter, no further proceedings were had until just prior to the commencement of this suit.

Since the construction of appellee's lines of railroad, as above described, conditions have so changed as to make it imperative on the part of the operator of said lines of railroad to locate extensive shops and yards at the city of Tulsa, and at a point therein known as West Tulsa; and in order to facilitate both the intrastate and interstate commerce business of said railway company, it has become necessary to move its said division point from the city of Sapulpa to the said city of Tulsa. The city of Tulsa has developed into a city of approximately 125,000 inhabitants, and has become one of the largest shipping centers in the State of Oklahoma. Immense oil fields and oil properties have been developed and constructed, and are being operated in the vicinity of, and in all directions from the city of Tulsa, which has become the center of such operations. Other industries, transacting great volumes of business, have been located, and are now being located and operated

in said city, and in the vicinity thereof, and use said city as their shipping center. The city of Sapulpa has developed to only a very minor degree, the population at the time of the filing of this suit being not to exceed 20,000 people; and very few of the industries operated, as hereinbefore set forth, use Sapulpa, or the terminals there located, as a shipping center. The topography of the ground in the vicinity of the Sapulpa yards and shops will not permit the location and construction of sufficient facilities for the transacting of the shipping business necessary to be transacted at the shops and division point located in that vicinity. It has been, and will continue to be, impossible for appellee to construct at Sapulpa sufficient shops and yards to transact the necessary business. It is further shown that because of improved conditions of roadbed, bridges, etc., the increase of motive power and enlargement of engines and other equipment, it is now necessary to the proper conduct of business of said railway company, as an interstate carrier, to increase the distances between its division points and large shops; that the railway company is engaged extensively in interstate commerce, carrying a large volume of such commerce, both freight and passenger, from Kansas City, Missouri, and points north and east, to Tulsa, and other points within the State of Oklahoma, and to points south in the State of Texas, and from St. Louis, Missouri, and points north, east and south, to Tulsa and other points within the State of Oklahoma, and other States

to the south; that the facilities and equipment, constituting the shops and division point herein described, are necessary and imperative to the transaction of its said interstate business; that a removal of its shops and division point to Tulsa and a consolidation of said shops with the shops now located at Tulsa, will enable the railway company to promote and aid its interstate commerce business by eliminating annually hundreds of thousands of dollars of operating expense; that among many other items it will be able to save in wages of employes more than $200,000.00 per annum, and in operating material and equipment, in fuel, power and lights, approximately another $100,000.00 per annum; that owing to the fact that it has been necessary for said railway company to construct and maintain extensive shops and yards in Tulsa, in addition to the shops and yards at Sapulpa, if it is prevented from removing its said shops and yards from Sapulpa to Tulsa, it will be necessary to maintain and operate, at great expense and loss, two extensive sets of shops and yards, within eighteen miles of each other, thus entailing great additional and needless cost and expense, resulting in great confusion and congestion of traffic, causing loss of time to shipments, and interferring with, and placing a direct burden upon interstate commerce business; that in the proper conduct and operation of its railroad, it becomes necessary from time to time for the railway company to readjust its division points, and to find better and more efficient, suitable and convenient

places for repair work, and for keeping its rolling stock and other instrumentalities of its railway used in interstate commerce in proper condition; that these matters are purely managerial and necessary to be confided to such railway company, the better to serve the public and its stockholders and investors. (See appellant's complaint, R. pp. 1-17, and supplemental complaint, R. pp. 54 to 63.)

The bills further alleged—and of course it was admitted by appellants, so far as the questions now involved are concerned—that the part of West Tulsa to which the shops were to be moved, and the vicinity thereof, are sanitary, healthful and in every way suitable to the convenience, health and enjoyment of its employes (R. p. 61).

Anticipating that the railway company intended to remove its shops and division point from Sapulpa to Tulsa, the appellants, Lawrence and Taylor, appearing for themselves and the Chamber of Commerce of the city of Sapulpa, and citizens of said city, appeared before the Corporation Commission of the State of Oklahoma, on the 29th day of December, 1926, and procured the following order:

> "This cause coming on to be heard on this 29th day of December, 1926, upon motion of the complainants, and it appearing that the defendant is taking steps toward the removal of its shops and division point from the city of Sapulpa in violation of the order of this Commission, entered on the 5th day of February, 1917, and in violation of the Act of the Legislature passed in 1917, it is ordered by the Commission that said cause be set down for hearing on the 17th day of January,

1927, and that in the meantime, and until the further order of the Commission, the defendant be, and it is hereby prohibited from moving its shops or division point from the city of Sapulpa, from changing the runs of either its passenger trains, or from taking any other steps towards changing its division point for either passenger or freight service from the said city of Sapulpa" (R. p. 76).

A hearing was set by the Corporation Commission for the 17th day of January, 1927. On the 11th day of January, 1927, appellee filed its bill against appellants, charging that the statutes herein above set forth, insofar as they were sought to be made applicable to the conditions described by the undisputed facts herein, were unconstitutional, confiscatory, arbitrary, unnecessary and void; and that, as so applied, they granted to the Corporation Commission authority to issue orders and decide questions directly regulating, affecting and constituting a burden on interstate commerce; that said orders were therefore beyond the authority of the Corporation Commission, and, therefore, void; and praying that appellants be enjoined from compelling appellee to submit to the jurisdiction of the Corporation Commission in matters relative to said removal, in order that appellee might not suffer irreparable injury and damage that it otherwise would suffer if prevented from removing its shops and division point from Sapulpa to Tulsa. It was further alleged in said bill that said statutes were unconstitutional and void, and that said Commission was without power to act under said statutes.

in that they were not a proper exercise of the police power of the State, and deprived appellee of due process of law, and of equal protection under the law, as guaranteed by the Fourteenth Amendment to the Constitution of the United States; and that same were arbitrary, unreasonable and unnecessary, because neither the shipping public, the traveling public, nor the public at large had any interest in the place where railroad shops or division points should be located; that the location of railroad shops or division points did not serve to protect the public morals, public safety, or public health; and the right of the State of Oklahoma to enact such a statute could not be traced or referred to any legitimate or well-known source of police power; and that said statutes constituted an unconstitutional interference with the right of the railway company to manage its property and operate it for the best interest of the public and the stockholders of such company, and to operate the same economically, which, by law, it was required to do; that same were void because it affirmatively appeared from the contents of said statutes that they were enacted purely to serve local interests, and not to serve the public, and this regardless of whether they injuriously affected the property rights of the railway company and interfered directly with interstate commerce. The complaint further alleged that said statutes declared if division points or shops had been located at any particular place in the State of Oklahoma for a period of five years, the presumption against

the right of removal should obtain against the railway company, and that the burden of proof should be upon said railway company. Therefore, it was alleged that said statutes constituted an arbitrary exercise of police power; that the five-year period, as announced in said provisions, had no just relation to the proposition as to whether the right of removal existed; and that the change in the rules of evidence, by virtue of said five-year period, was unconstitutional, and deprived the appellee of its right without due process of law, and of equal protection of the law, as guaranteed by the Fourteenth Amendment to the Constitution of the United States (R. pp. 6-9).

Upon application of the appellee, a hearing was had, and a temporary injunction granted, as prayed for, by a three-judge court (R. p. 79). Appellants appealed from this order, and the lower court was reversed by this Court (*Lawrence* v. *St. Louis-San Francisco Railway Co.*, 274 U. S. 588).

During the appeal by appellants, last mentioned, the temporary restraining order made by the three-judge court, and appealed from by appellants, remained in full force and effect. This order had the effect of permitting appellee to remove its shops and division point. (*Lawrence* v. *St. Louis-San Francisco Railway Co.*, 274 U. S. 588.) Appellants were given an opportunity to supersede the judgment of the lower court during that appeal. This is shown af-

firmatively in the *per curiam* opinion of the three-judge court, filed on November 28, 1927, in which it is said, with reference to appellants' former appeal:

> "Defendants were afforded an opportunity to suspend the temporary injunction by executing a bond, which they declined to do" (R. p. 51).

and further:

> "Subsequent to the entering of the temporary injunction, and after counsel for defendant had announced that they would not suspend the order of the court pending appeal, plaintiff removed its division point and its shops to Red Fork (West Tulsa), now a part of the city of Tulsa" (R. p. 50).

The record further affirmatively shows that on the 24th day of January, 1927, appellants presented to the lower court their petition for appeal, which said petition was in regular form, and contained, among other things, the following representation:

> "Your petitioners further pray that the proper order touching security be made without superseding the decree referred to, and they tender bond in such sum as the court may require" (R. p. 55).

During the existence of this temporary restraining order made by the lower court, which appellants refused to supersede, and specifically stated that they would not supersede, the railway company moved its shops from Sapulpa to West Tulsa. In counsel's brief filed herein it is stated that this was hurriedly done. There is nothing in the record to show that any haste was used in such removal. The

order granting temporary restraining order was made on the 19th day of January, and was in full force and effect until May 31, 1927, during which time the division point and shops were moved.

On October 22, 1927, appellants presented their motion to the lower court, asking that the railway company be compelled to replace their shops at Sapulpa, and undo the things which appellants could have prevented its doing by superseding the judgment of the lower court during their appeal. This motion was refused by a *per curiam* opinion, set forth in full in the record herein (R. p. 44).

At the time of the hearing last mentioned, however, the trial court stated that the railway company, as a preliminary step to the further hearing of the case, should apply to the Oklahoma Corporation Commission to dissolve its restraining order, and to ratify the action of the road in moving the shops, and that the case would not be put to final hearing until this was done (R. p. 39). Acting in obedience to this direction from the court, the railway company made application to the Corporation Commission to dissolve its restraining order, which had theretofore been issued, restraining the railway company from moving its shops, and to ratify its actions in such removal, in which application the railway company set forth in detail, as it had set forth in its complaint filed herein, the reasons necessitating such removal.

This application was made by the railway company on November 5, 1927 (R. p. 58), and set for hearing by the Corporation Commission on December 5, 1927 (R. p. 59), at which time appellants appeared before the Corporation Commission and presented their objections, in writing, to the Commission's hearing the matter on its merits (R. p. 83). By these objections, appellants demanded that before we be accorded a hearing by the Corporation Commission, we do that which the Federal Court had already decided was unnecessary for us to do—that is, go to the enormous expense of removing the shops from Tulsa to Sapulpa; or that we state to the Corporation Commission that we would immediately comply with whatever order it might make regarding the removal of the shops; that we surrender any right we might have to supersede such order, on appeal, or to enjoin its enforcement in the Federal Court (R. p. 85). In said objections, appellants further represented to the Commission that we were in contempt of the Commission by reason of the fact that we were obeying the order of the trial court in permitting the shops to remain at Tulsa, and that we had not offered to purge ourselves of such contempt by offering to do that which the Federal Court had said was unnecessary for us to do (R. p. 85). At the conclusion of the hearing, the Commission held that our action in permitting the shops to remain at Tulsa, although we had been given that permission by the Federal Court, was in contempt of that body, and held, in effect, that, as a price

for a hearing of our application on its merits, we should forego the permission granted us by the Federal Court to retain our shops at Tulsa during the pendency of this suit, or pledge ourselves, in good faith, to abide by whatever order the Commission might make regarding the return of the shops, thereby foregoing our legal right to supersede such order if it was adverse to our interests, on appeal, or to enjoin its enforcement in the Federal Court in case the Corporation Commission should make an order which was arbitrary, unconstitutional or void (R. pp. 86-88).

Thereafter, and on the 12th day of January, 1928, the railway company filed a supplemental bill in this cause, in which its application to the Corporation Commission the objections of appellants to the Corporation Commission's hearing said application, and the order made by the Corporation Commission as a result of such objections were fully set out (R. p. 54).

On January 17, 1928, appellants filed in the United States District Court their motion to dismiss the bill and supplemental bill, for want of equity (R. p. 88). At the hearing of this motion, appellants announced that they intended to stand upon their motion to dismiss appellee's original and supplemental bills, and in the event same was overruled, they did not desire to plead further, but were willing that the cause be submitted upon said complaint, as amended, and appellee's supplemental complaint (R. p.

99). On March 12, 1928, after the cause had been submitted upon the allegations contained in appellee's original and supplemental complaints, the three-judge court overruled appellants' motion to dismiss, and entered judgment in favor of appellee (R. pp. 91-104).

ARGUMENT

As appears from the preliminary statement made by appellants in their brief, this cause has already been before this Court, and the opinion is found in *Lawrence* v. *St. Louis-San Francisco Railway Co.*, 274 U. S. 588. Both sides filed extensive briefs in the former appeal, and most of the questions now presented to the Court were presented then, but this Court did not decide them, because the reversal of the case was not based upon the substantial claim of appellee in its complaint, but largely upon the improvident action of the trial court, under all the circumstances, in granting an interlocutory or preliminary injunction.

Before we proceed to a discussion of the main propositions in this cause, we desire to consider and discuss some of the preliminary statements made by appellants in their brief. For the purpose of our discussion, the statements contained in appellants' brief will be grouped under the following propositions:

The railway company in seeking relief against the state statute in question, has done all things required of it under the law.

The contention of appellants is now, and has been, that before the appellee could enter a court of the United States to attack the state statute in controversy here, it must exhaust its remedies before the state tribunals, and they argue as a corollary from such statement that this action was premature; that the Corporation Commission has never passed upon the right of the appellee to move its shops and division point from Sapulpa; that this is necessary before the Federal Court in this case could, or can, exercise jurisdiction.

We stated, as we stated before in the hearing of this case, that whenever a state statute is, on its face, obnoxious to any provision of the Constitution of the United States, any person or corporation, against whom or which such statute is attempted to be enforced by state officers, whether acting as the State Commission, or otherwise, may, in the first instance, without waiting for the enforcement of the statute, apply to the appropriate Federal tribunal for relief against such state.

The case of *Ex parte Young*, found in 209 U. S. at page 123, 52 L. ed. 714, sustains this proposition, and for years and years the doctrine of this case has been recognized and approved by later decisions of this Court. The opinion in the case is an exhaustive one and seems to have considered every phase of the controversy. And in the last

analysis that case declares that any attempt of state authorities to enforce a statute, unconstitutional on its face, when measured by the provisions of the Federal Constitution, may be met by application to the appropriate Federal Court to arrest any action by the state authorities under such statute.

In this connection we beg to say that there is a vast difference between state authorities moving to execute a state statute, unconstitutional on its face, and the movement of a state commission, or body, toward the creation of some condition, or the making of some order, which may prove to be unconstitutional. So that in the case of the statute unconstitutional on its face, it is perfectly proper to attack such statute, in the first instance, in the Federal Court; when in the other case it might be proper and necessary to await the final action of state authorities before the order or condition created is open to attack in the Federal Court.

Mr. Justice Pitney, who rendered the opinion in the case of *Greene* v. *Louisville Railway Co.*, 244 U. S. 499, 61 L. Ed. 1280, in commenting upon the Young decision, on page 506, said:

> "Individuals who, as officers of the State, are clothed with some duty in regard to the enforcement of the laws of the State, and who threaten and are about to commence proceedings, either of a civil or criminal nature, to enforce against parties affected an uncon-

stitutional act, violating the Federal Constitution, may be enjoined by a Federal court of equity from such action.

"In repeated decisions since *Ex parte Young*, that case has been recognized as setting these questions at rest."

Answering, therefore, the contention of appellants in their brief that this action was premature, we refer as a general proposition to the long line of cases cited by the Court since the Young case, and contend that the appellee was well within its rights when it applied, in the first instance, to the Federal Court to stop the enforcement of a statute which is charged and believed to be invalid when measured by the Federal Constitution.

We believe, however, that the appellants have estopped themselves from asserting that this action was premature, This case went on appeal to this Court, and this Court reversed the case, and in the opinion granting such reversal this Court said to the lower Federal Court to retain jurisdiction of this case until final hearing, but suggested that as a matter of comity and courtesy it might be well to pass the matter of removal up to the Corporation Commission of the State of Oklahoma and await the action of that Commission. This Court in that connection said:

"The railway would not thereby have waived its right to contest in the Federal Court the validity of the Oklahoma law."

In other words, we understand the Court to say and

to mean in that decision that the Federal Court should delay further action in the matter before it until the Corporation Commission had an opportunity to pass on the removal question upon application to be made to it by the appellee. That application was made as directed, seasonably and in good faith. When the application before the Corporation Commission was taken up, counsel for the appellants prayed the court not to hear the application until the shops and division point which had been removed should be restored to Sapulpa, or until the appellee making the application to the Corporation Commission should agree to abide by whatever order the Commission might make with reference thereto. Judge Van Valkenburg of the three-judge court, takes up this question in his opinion on page 101 of the transcript, and he there says:

> "There is nothing in this opinion (meaning the Supreme Court opinion) which can be construed as a command that the matter must be referred to the Corporation Commission as a condition precedent to final hearing. But in order that the rule announced by the Supreme Court should be observed in spirit, as well as in letter, and that full deference should be accorded to the demands of comity and courtesy, we exacted application to the Commission before we would enter upon a final hearing of the case. The Commission has declined to hear the application until the performance of a condition which it is without power or authority to enforce. The denial by this court of present restoration was not made out of disrespect for the Commission nor in disregard of its legitimate authority in the premises. It was made in the exercise of what we deemed to be a sound discretion, under the circum-

stances now existing, for the prevention of what might be unnecessary expenditure, and pursuant to a jurisdiction which had attached, which was expressly retained, and of which this court could not be collaterally deprived. By making its application in good faith, and the refusal of the Commission to entertain that application, complainant has exhausted its remedy before that tribunal in a legal sense. Since this result was brought about at the instance and demand of respondents, they can no longer be heard to insist upon a decision which they opposed and prevented."

We say, therefore, that the question in this case as to whether the appellee could go before the Federal Court without first going to the Corporation Commission, has been eliminated, because following the insistence of appellants that the matter must first be heard before the Corporation Commission, the lower Federal Court ordered appellee to go there in order to satisfy that insistence of appellants. The appellee prepared its application in due form, but was denied entrance into the Commission because it would not agree to a condition which was arbitrary, unjust and unreasonable; which was in defiance of an order made by the United States Court, and obedience to which would have destroyed and nullified every order or action by the United States Court in this cause, and would have collaterally deprived that Court of jurisdiction when the appellants knew that this Court, in its former opinion, had not only recognized the jurisdiction of the lower Federal Court, but had ordered that Court to retain jurisdiction until final hearing.

The appellants, therefore, had an opportunity to contest this matter of removal before the Corporation Commission before a final hearing in this case in the Federal Court, but declined that contest by the imposition of unreasonable and impossible conditions. We say, therefore, that it does not lie in the mouths of these appellants to claim that this action is premature, and that we ought to have exhausted our remedies before the state tribunals before entering the Federal Court for relief. The appellants insisting that the Corporation Commission must first hear this case, were granted that insistence, and yet when the appellee went before the Corporation Commission to try out, in good faith, the merits of its application, it was denied entrance into the Commission and denied a hearing at the prayer of these appellants. Under this state of affairs there was nothing left to the appellee except to return to the Federal Court retaining jurisdiction, report to that Court that the Commission had refused to hear its application for removal, and ask for final judgment.

We conclude, therefore, that the position of the appellants that the action in this case was premature; that the appellee ought to have gone before the Corporation Commission to raise the constitutionality of the law, and have permitted that Commission to go to final judgment in the cause before applying to the Federal Court, is untenable and unsound. The opinion of the three judges on the motion to dismiss the complaint, found on page 91 of the

transcript of the record, in construing the opinion of this Court in the former appeal, said on page 100 of the transcript:

> "The jurisdiction of this court to proceed to final hearing was recognized."

Again quoted from the opinion of this Court:

> "No right or interest of the railway would have been prejudiced by participating in the hearing before the Commission and awaiting the result thereof. The railway would not thereby have waived its right to contest in the Federal Court the validity of the Oklahoma law."

And again quoted from the former opinion of this Court:

> "The effect of the Commission's restraining order was merely to keep things in *statu quo* until the final hearing in Federal Court."

We now proceed to notice the second proposition of the appellants in their brief, in which they say that the application made by the railway company to the Corporation Commission did not comply with its duty or with the requirements of the statute.

An examination of this contention by the appellants necessitates a brief statement of facts which are more fully set out and elaborated in the statement in this brief.

The lower Federal Court granted an injunction against the Corporation Commission from enforcing the state statute now in controversy. The case was appealed to this

Court and reversed on the ground that the preliminary injunction ought not to have been granted. No supersedeas bond was given by appellants to prevent the execution of the judgment of the Federal Court. Indeed, the attorneys for appellants stated, in open court, that they did not desire to supersede the judgment, but simply gave a cost bond. The railway company was compelled by the Federal Trial Court to execute a bond in the sum of fifty-thousand-dollars to answer for all damages that might result from the improvident and erroneous issuance of the temporary injunction. Under this state of facts, there being no supersedeas bond, and a fifty-thousand-dollar bond required of the railway company to answer for damages, the company moved its shops and main terminal to the City of Tulsa. The right of the railway company to remove under such conditions will be discussed under a separate proposition in this brief.

While the judgment of the lower Federal Court granting a temporary injunction was reversed by this Court, the lower Federal Court was ordered to retain jurisdiction of the cause so that it might go to final hearing when the proper time arrived.

In due course of time, appellants, through their attorneys, appeared before the lower Federal Court, showed that the shops and terminal had been removed from Sapulpa to Tulsa, and asked and prayed that Court to order

restitution and compel the railway company, at once, to take its shops and terminal back to Sapulpa, by reason of the fact that the order granting the temporary injunction had been reversed and set aside, and that it was the duty of the Federal Trial Court to undo what it had already done. The Federal Trial Court heard such application for restitution and denied the same and the reasons therefor are stated on pages Nos. 56 and 57 of the transcript in this cause. Attorneys for appellants alleged in their application for restitution that the Corporation Commission had no power to order restitution, and that the Federal Court was the only court that could order restitution. The lower Federal Court, after denying restitution, made an order on appellee, found on pages Nos. 43 and 44 of the transcript that before the Federal Court would take any further steps looking to a final hearing, appellees should make application to the Corporation Commission to dissolve its restraining order heretofore made, restraining the appellee from removing its shops and division point from the City of Sapulpa to the City of Tulsa, and asking the Commission to ratify the action of said railway company in removing its said shops and division point during the pendency of the cause, and the trial court, in obedience to the opinion of this Court on the former appeal, in said order retained jurisdiction of the cause so that it might later go to a final hearing. The appellee, with due dispatch, carried out the order of the Federal Court and made application to the

Corporation Commission as shown by the statement in this brief, asking that it be heard; that the injunctive order heretofore issued against the railway company be dissolved, and that the removal of its shops and division point heretofore made to Tulsa, be approved.

Appellants, through their attorneys, advised the Commission not to hear the application of appellee unless appellee either immediately restored its shops and terminal, or agreed to do so, if the Commission should hold against the removal, and that if the railway company should not accede to this demand on the part of the Commission, it would be in contempt, and the Commission would refuse to hear the case, which it did refuse to do.

The gravamen of the appellants' complaint to the Commission was that unless the railway company restored its shops and terminal before the hearing before the Commission was commenced, or agreed to do so on the judgment of the Commission, the railway company would be in contempt of the Commission, and the appellants cite a long line of cases in their brief to the effect that a party in contempt cannot be heard to apply for affirmative relief which, in any way, recognizes and ratifies its contempt. In the main we have no quarrel with the authorities cited. It appears that in each of these cases the party held to be in contempt had, on its own initiative, disobeyed some order of the court without any excuse or justification for

the disobedience of said order; but the situation here is entirely different. Appellee went before the Corporation Commission under specific and compulsive direction of the Federal Trial Court. It did exactly what the Federal Court having jurisdiction of this cause told it to do. We followed the direction of the Federal Court both in spirit and letter, and when the matter was presented to the Corporation Commission, it declared the appellee in contempt, although the appellee was doing the very thing the Federal Court ordered it to do. So, in the last analysis, the Corporation Commission is holding appellee in contempt for doing the thing which the Federal Court having jurisdiction of the cause, ordered it to do. We cannot understand how the Corporation Commission can exercise such an arbitrary and extraordinary power against this railway company, and, by its order refusing us hearing, absolutely nullify all the orders of the Federal Court sending us to that tribunal in order to obtain a hearing. Therefore, it seems to us to be clear that this is not a case where a litigant is asking affirmative relief when it is in open contempt of the tribunal from which it asks such relief; but is a case where the litigant is not only not in contempt, but is acting upon a valid order of a court of the United States having jurisdiction to make such order.

We think the action of the Corporation Commission in refusing to hear the application of the railway com-

pany for a hearing on these things involved in this case, was arbitrary, unreasonable and unjust, and it seems to us that the appellants are estopped from saying that appellee did not comply with its duty, or with the requirments of the Oklahoma Statute.

If the appellee had not attacked and was not attacking the constitutionality of the statute in question, and had gone before the Corporation Commission with an application to remove its shops and division point while an injunction of the Corporation Commission was still outstanding, preventing appellees from a removal, and the Corporation Commission had refused such hearing until certain extraordinary conditions were complied with, the Corporation Commission would certainly be depriving the appellee of due process of law, because appellee would have been in a position where the injunction held it from removing its shops, and yet where it could not get a hearing for that purpose, which certainly would not be due process of law. We can see little difference between this suggested case and the instant case. We were denied a hearing unless we complied with ridiculous and impossible conditions. What remedy was left to this appellee except to go to the Federal Court retaining jurisdiction of this cause, and ask for final judgment? This Court, in its opinion in this case on former appeal, said that if the facts in the case showed removal would result in improved service and in economy of operation, the Commission ought to authorize

removal. These facts appeared undisputed before the Federal Trial Court on the final hearing of this case, and, in our opinion, it could do nothing except render judgment for the appellee.

The act of the Legislature was never primarily designed to protect the health of employes and their families.

Nobody denies the power of a State Legislature to enact laws for the health and safety of railroad employes. The very essence of the police power of a State or sovereignty consists in the ability and power of the State or sovereign to enact laws for the health, safety and morals of its people. But, it is also true that no State in this Union under the guise of police power, can enact a statute which is arbitrary and unnecessary, or which offends against any provision of the Federal Constitution. The weakness of the argument of appellants to sustain the point above quoted, it seems to us, is clearly apparent.

The statute under consideration consists of two separate and distinct branches:

Section 3482 of the statutes, provides that railroad shops and division points which have been located for as much as five years at a particular place, shall not be moved without the permission of the Corporation Commission.

Section 3484 of the statutes, provides that if the Commission grants the application under Section 3482 to remove, it may further consider the point to which the rail-

way company proposes to remove, and it may determine whether such point will endanger the health of employes, or their families.

This is not a statute which provides that at any time a railway company removes its division point or shops, it shall remove them to a sanitary and habitable place. Such statute, standing alone, might be claimed as a health statute, and therefore valid. But the point of attack which we are making upon this statute, is as to the power and right of the Legislature to confer upon the Commission the authority to say when the railway company shall move its railway shops and division point. From a reading of the statute it will be seen that the sanitary provision has no relation to the question as to whether a removal at all shall be had, but has relation only to the point to which removal is made, after the Commission has sustained the right to remove.

In other words the first thing to be determined by the Commission is whether the railway company shall move its division point and shops. It is as to the right of the Commission to determine that question of removal that we make our attack. On the face of the statute it is clear that the right, in the first instance, to remove is not to be determined, according to the very language of the statute, by a question of health, a question of morals, or a question of safety or public welfare, but it is only after the right to

remove has been granted that the sanitary clause of the statute is considered at all. Therefore, it seems to us unreasonable and untenable to say a sanitary or health provision, which relates only to the place to which the removal shall go, saves the whole statute as founded upon a police regulation for the public health. The question as to whether the railway company can remove at all, cannot involve the health of the employes of the community, and it is as against the power of the Corporation Commission to determine in the first place whether the railway company shall remove at all, that we center our attack.

We, therefore, respectfully contend that the Legislature could not say that one separate and independent section of a statute which is claimed to be unconstitutional, can be saved by a further provision in the same statute as to sanitary conditions. We, therefore, say this statute was not primarily designed to protect the health of railroad employes and their families; that the sanitary provision of the statute, with reference to a proposed location after change, does not save a prior provision which, in its very essence, we claim is unconstitutional.

The effect of the interlocutory injunction, and the question of restitution.

Counsel's ninth, tenth and eleventh propositions, shown at pages 43, 46 and 54, respectively, of their printed brief, are as follows:

"Ninth.

"It was the duty of the district court to require the railway company to return its shops and division point to Sapulpa.

"Tenth.

"It is well settled that on reversal of a judgment restitution will be ordered.

"Eleventh.

"Our motion to require the railway company to restore the status quo should have been heard by the district judge, and it was error for the three judges to sit."

These propositions will be considered together. On page 43 of their brief, counsel say, with reference to the return of the shops to Sapulpa:

> "The point is, of course, immaterial in the event of an affirmance, but if there is a reversal it becomes important."

With regard to the number of judges sitting at the hearing of appellants' motion to restore the *status quo*, counsel say, at page 54 of their printed brief:

> "This point, in all probability, will not arise in this Court. If this Court should reverse the lower court, and direct restitution to be made, the lower court will, of course, make it whether the district judge sits alone, or whether the three judges sit."

From the above it is seen that counsel concede neither of these three propositions is material or important to this this Court, in its consideration of the main questions in-

volved in this appeal. With this contention we agree. If this Court should hold that the lower court was right in rendering judgment in favor of the appellee, on the undisputed facts in this case, then the effect of the decision will be, of course, that the railway company had the right to remove its shops, and that such removal was at no time wrongful. Of course, if this Court should reverse the holding of the lower court, in its final decree, and hold that the statutes attacked in this suit are valid, and that the railroad company in no event should have removed its shops until it made application to the Corporation Commission, and until it had received an affirmative permission from that Commission, then a different proposition would be presented.

The above being true, we think the questions as to whether or not three judges should have sat at the hearing of appellants' motion to restore the *status quo*, and the correctness of the trial court's holding that it should not compel the removal of the shops to Sapulpa during the pendency of this suit have become moot insofar as this appeal is concerned, except only insofar as the last named decision affected our status before the Corporation Commission, in our application for its approval of our actions in moving our shops during the existence of the district court's interlocutory injunction, vacated by this Court in its decision in *Lawrence* v. *St. Louis-San Francisco Railway Co.*, 274 U. S. 588.

As shown in the statement at the beginning of this brief, the shops and division point were moved by us during the time the interlocutory injunction of the trial court—which this Court has held had the effect of setting us free to move—was in full force and effect. The mere fact that this Court has held said order was improvidently issued does not affect its validity and permissive force during the time of its existence. In the opinion of this Court, rendered herein, this Court said:

> "Although proper practice demands that the provision thus prescribed by Congress be scrupulously observed, disregard of the statutory requirement concerning the form of the order would not render the interlocutory decree void. *Druggan* v. *Anderson*, 269 U. S. 36, 40, 70 L. ed. 151, 153, 46 Sup. Ct. Rep. 14."

In *Druggan* v. *Anderson, supra,* cited by this Court in the above excerpt, petitioner was being prosecuted for contempt in disobeying the provisions of a temporary injunction, and took the position that the injunction order was void for want of notice required by Equity Rule 73, and the Act of October 15, 1914, page 323, Section 17, 38 Stat. at L. 730-737, C. O. S. Sec. 1243, 6 Fed. Stat. Ann. 2d ed., page 139. In regard to such contention, this Court said:

> "But if notice were required, the injunction could not be disregarded as void."

Also, in *Arkansas Railroad Commission et al.* v. *C., R. I. & P. Ry. Co., 274 U. S. 597, 71 L. ed. 1224,* decided by

this Court at the same term as *Lawrence* v. *St. Louis-San Francisco Railway Co., supra*, this Court said:

> "Disregard by the District Court of the United States, in granting an interlocutory injunction, of the provisions of U. S. Code that every order for an injunction shall set forth the reasons for the issuance of the same does not render the order void."

Thus, it is seen that the interlocutory injunction was effective from the time it was issued until vacated by this Court, and as it was not superseded, the railway company was privileged to act in accordance with its permissive effect.

As we understand the matter, there are two methods of appeal, one with supersedeas, and the other without. If a judgment of a lower court is not superseded, it has all the effects of a final judgment until vacated. Counsel, in their brief, say, however, that the members of the Corporation Commission, and the Attorney General of the State of Oklahoma, and two private citizens of Sapulpa would not be expected to subject themselves to a possible great personal liability in order to supersede this judgment. We submit that the attitude of the appellants at the time this judgment was rendered could in no manner affect its force and validity. However, it was within the power of the trial court, and this Court, had proper application been made by appellants, to supersede the interlocutory order in any manner consistent with the rights and equities of all parties concerned. If appellants had

made the proper application to the trial court, or to this Court, and either of these courts had concluded that, as appellants appeared in representative capacities, they should not subject themselves to personal liability, then proper orders could have been made superseding the interlocutory order, without any of the dangers mentioned by counsel. *Merrimack River Savings Bank* v. *City of Clay Center et al.*, 219 U. S. 527, 55 L. ed. 320; *Hovey* v. *McDonald*, 109 U. S. 150, 161, 27 L. ed. 888, 891, 3 Sup. Ct. Rep. 136; *Knox County* v. *Geo. W. Harshman*, 132 U. S. 14, 33 L. ed. 249; *Interstate Commerce Commission* v. *Louisville & N. R. Co.* 101 Fed. 146.

In *Hovey* v. *McDonald, supra*, this Court said:

> "In recognition of this power, and for the purpose of facilitating its proper exercise in certain cases, on appeals from the circuit courts, this Court, by an additional rule of practice in equity, adopted in October term, 1878, declared that 'when an appeal from a final decree in an equity suit, granting or dissolving an injunction, is allowed by a justice or judge who took part in the decision of the cause, he may, in his discretion, at the time of such allowance, make an order suspending or modifying the injunction during the pendency of the appeal upon such terms as to bond or otherwise as he may consider proper for the security of the rights of the opposite party.' "

In this case, appellants were given every opportunity to supersede the interlocutory order. In the *per curiam* opinion of the Court, denying appellants' motion for restitution during the pendency of this case, the three-judge court said:

"Defendants were afforded an opportunity to suspend the temporary injunction by executing a bond, which they declined to do" (R. 51).

The Court, in the same opinion, said further:

"Subsequent to the entering of the temporary injunction, and after counsel for defendant had announced that they would not suspend the order of the court, pending appeal, plaintiff moved its division point and its shops to Red Fork (West Tulsa), now a part of the city of Tulsa" (R. 50).

An excerpt from appellants' petition for appeal from the interlocutory injunction order is contained in the record of this appeal, and is shown at page 55 thereof, as follows:

"Your petitioners further pray that the proper order touching security be made without superseding the decree referred to, and they tender bond in such sum as the court may require."

It was very obvious that the primary purpose which prompted appellee to secure the injunction order was to permit it to do the things which it alleged the citizens of Sapulpa and the State officials were preventing it from doing; that is, to move its shops and division point from Sapulpa to Tulsa. We do not believe that appellants can consistently plead surprise when the very thing was done which appellee was attempting to get permission to do. The record in this case shows that at the time of the filing of our original bill, District Judge Franklin E. Kennamer granted a temporary restraining order, which, by its terms, was effective until the hearing on our application for an

injunction. This order restrained appellants from taking any action, having for its purpose the prevention of the removal of the railroad shops, or the changing of the runs of the railway company's trains, and also contains this provision:

> "It is further ordered that the plaintiff in this case take no action toward removing its shops, division point, or changing the runs of its trains, until further order of this Court" (R. 78).

At the hearing on our application for injunction, a temporary injunction was issued, which contained no provision restraining the railway company from moving its shops. The bond on the part of the railway company was fixed at $50,000.00. The change in these orders, and the increase in the bond was clearly made with the idea on the part of everyone connected with the case that the railway company would be free to act unless the interlocutory injunction was superseded. The bond was fixed at the sum of $50,000.00 for the evident purpose of securing appellants in the collection of any damages which they might incur if they did not supersede the order, and the railway company moved its shops.

Of course it will not be contended that the appeal had the effect of superseding the interlocutory injunction order. *Knox County* v. *Harshman*, 132 U. S. 14, 33 L. ed. 249; *State ex rel. Holladay* v. *King, Sheriff, Indiana*, 66 N. W. 82; *Bound* v. *S. Carolina Ry. Co.*, 55 Fed. 186;

Society Anonyme Bu Filtre Chamberland Systeme Pasture et al. v. *Blount*, 51 Fed. 610; *Interstate Commerce Com.* v. *Louisville & N. Ry. Co.*, 101 Fed. 146; *State ex rel. Hogan et al.* v. *District Court of Thirteenth Judicial District*, 25 Okla. 871, 108 Pac. 375. In *Knox County* v. *Harshman, supra*, this Court said:

> "The general rule is well settled that an appeal from a decree granting, refusing or dissolving an injunction does not disturb its operative affect."

The trial court did not abuse its discretion in refusing restitution.

As already stated, we think this question is material at this time only as it affected our status before the Oklahoma Corporation Commission. When this case was returned to the trial court from the former appeal, the interlocutory injunction order had been vacated by this Court. Owing to the fact that that order had not been superseded during appeal, the shops had been moved from Sapulpa to Tulsa, at a considerable expense on the part of the appellee. A $50,000.00 bond had been given to secure appellants against loss by reason of such removal. This Court had held, in effect, that the district court should retain jurisdiction, but had intimated that before final hearing, application should be made, on the part of the railway company, to the Corporation Commission. With matters in this condition, appellants filed a motion to require the railway com-

pany to go to the enormous expense of returning its shops to Sapulpa before any further steps were taken, either by the trial court or the Corporation Commission. They conceded in their motion that the Corporation Commission had no authority to require the shops to be removed to Sapulpa, but addressed the sound discretion of the trial court in this regard. They then relied, and now rely upon many cases to the effect that after final judgment, restitution should be ordered. The trial court, after considering the argument and authorities presented by both sides, said:

> "We are of the opinion that nothing can be accomplished, considering and balancing the conveniences in the case, by requiring plaintiff to remove the shops to Sapulpa pending a final determination of the case. The shops were moved at great expense to the plaintiff, and further expense will be incurred if the shops are restored. Defendants could have prevented the removal by executing a bond, which they declined to do, and as the issues now presented are so doubtful, this Court, in the exercise of a sound discretion, should deny restitution. In so ruling, the comparative advantages and disadvantages involved, the conveniences and inconveniences of the parties hereto, as well as the interests of the shipping public generally, have been considered. We think an order of restitution should not be made, if at all, until after final hearing, when the other rights of the parties are established" (R. 52).

In so holding, the trial court followed *Goltra* v. *Weeks*, 271 U. S. 536, 70 L. ed. 1074; *State* v. *Horton et al.*, 97 N. W. 434; *Gould* v. *McFall*, 12 Atl. 336, 4 Am. St. Rep. 606.

At the time the trial court rendered the *per curiam*

decision last mentioned, it had heard practically all the arguments in the case, and was evidently of the opinion that appellee (plaintiff below) should recover provided, of course, an additional showing was not made to the contrary. Being of that opinion, would it not have been an idle form to cause the railway company to go to the enormous expense of removing its shops to Sapulpa, and then, in the event that it recovered, to move them again from Sapulpa to Tulsa? In *Goltra* v. *Weeks, supra,* this Court said:

> "At the hearing it was made plain that Goltra was not entitled to the possession, and the court—one of equity—did not go through the idle form of restoring the property to Goltra by way of correcting the Colonel's wrong, and then requiring a re-delivery to the lessor.
>
> "As it is, the Court has taken over the fleet and given it to Goltra under bond, and the only issue that remains is whether the injunction and the restoration should be maintained, or the injunction be dissolved and the fleet returned to the lessor.
>
> "On an appeal from a temporary injunction it often happens that where there is a balance of convenience and doubt as to the issue, the *status quo* under the restraining order and the restoration should be maintained until a final hearing; but in this case in the court hearing it, the issue was fully treated as if on final hearing."

We think the trial court was fully justified, owing to the condition of this case at the time of the return of the mandate of this Court, in deciding that, from the comparative advantages and disadvantages involved, the conven-

iences and inconveniences involved, as well as the interests of the public, the railway company should not be compelled, during the pendency of this trial, to move its shops from Tulsa to Sapulpa.

The effect of the order of the trial court refusing restitution upon our attitude before the State Corporation Commission.

It is conceded by counsel for appellants that the question of restitution was one within the jurisdiction of the trial court. A full hearing was had upon this subject, and restitution during the pendency of this suit was refused. The effect of the order of the trial court in refusing restitution was to hold matters in *status quo* until the termination of this suit. With matters in this condition, the trial court directed that, as a preliminary step to the further hearing of this case, we make application to the Corporation Commission for the revocation of its restraining order, and ratification of our action in moving. This, we did, presenting to the Corporation Commission, the matter as fully as we had presented it to the trial court (R. 63-75), but there we were met with the demand on the part of appellants that we do what the trial court said was unnecessary to do during the pendency of this case—that is, remove our shops from Tulsa to Sapulpa—or that we treat whatever order the Corporation Commission might make as final, and immediately remove our shops from Tulsa to Sapulpa in case the Corporation Commission so directed.

The position of appellants before the trial court, and before this Court on the former appeal, was that we should have made application to the Corporation Commission before asking affirmative relief from the Federal Court. This Court held, in its former opinion, that the Federal Court could retain jurisdiction of the case, and application could still be made to the Corporation Commission before final judgment. The trial court directed that this be done. This was, in substance, at least, a compliance with appellants' demands; but when we went before the Corporation Commission, and under the direction of the trial court, in good faith, submitted all our case to that Commission, appellants objected to such a hearing, but succeeded in getting the Corporation Commission to hold that in obeying the direction of the trial court we were in contempt of the Corporation Commission, and that such Commission would refuse us even a hearing until we did that which the Federal Court had already adjudged we were not compelled to do until the final hearing of this case.

One of two courses was open to us: First, we could go to the enormous expense of removing our shops to Sapulpa, before the final hearing of this case—a thing that had already been adjudicated in our favor by the Federal Court. Second, we could go back to the Federal Court with a supplemental bill, detailing our acts before the Corporation Commission, and ask relief, as a matter of equity, without being compelled to do that which the court had

adjudged we were not compelled to do before obtaining such relief. Naturally, we selected the latter course.

If the trial court had jurisdiction to decide the question as to whether or not we should restore our shops during the pendency of this action, then we certainly had a right to act and rely upon that decision; and in such case, the Oklahoma Corporation Commission had no right to deprive us of the right that the Federal Court had given us, as the price of a hearing before that body.

We have noticed these several points raised in appellants' brief in the order which they have been presented in the brief. We shall now proceed to state the points upon which we rely, as affecting the constitutionality of the statute in question.

I.

The statute now under consideration is a regulation of interstate commerce, is a direct burden upon interstate commerce, and interferes directly with interstate commerce.

We contend that the statute which we are attacking in this cause is, on its face, a regulation of interstate commerce; that in its necessary operation it will seriously interfere with interstate commerce; that if sustained, it amounts to State operation of the railway's business, and that, therefore, this State statute is in the "teeth" of the

commerce clause of the Constitution. It would be almost an affront to this Court to take its time to discuss the origin of this commerce clause of the Constitution, its necessity and the salutary effect it has had in the protection of property and business within the confines of the American Union. We do know that, in its very essence and purpose, it is a limitation upon the police power of the States. It was intended to make commerce between the States and foreign nations free and untrammeled, subject only to the controlling and regulating power of the National Government. It is not denied by us, and it cannot be denied, that under many decisions of this Court police regulations of a State, with reference to interstate railroads, have been sustained and will be sustained, and this is so even though Congress has passed no legislation with reference to the subject matter, but the rule is, and has always been, that the State statute in question must be necessary; that it must serve some public purpose within the reach of the State through its police power, and that under the guise of police power the State can never be permitted to regulate, in the least degree, interstate commerce or to place a direct burden upon the same. It is obvious, therefore, that every State statute under consideration by this Court, as to whether it was a valid exercise of the police power of the State, considering its operation and effect as against the commerce clause of the Constitution, will depend not only upon the language of the

law, but the subject-matter covered by the law, and the relation of that subject-matter to interstate commerce.

This Oklahoma Statute confers the power upon the Corporation Commission of the State to determine whether a railway company, largely interstate in its character, and doing largely interstate business between many States, shall change its division points from one place to another on its line, or its shops from one place to another on its line. It becomes necessary, therefore, to consider the subject-matter of this legislation and its relation to interstate commerce as such. It is pertinent, therefore, to inquire what division points are; what they mean to an interstate railroad, and what part their locations play in the movement of interstate commerce and in the successful conduct of the railway's business in the interest of the public and of the stockholders of the road.

In our complaint filed in the Federal Court in this case, we set up that this statute fetters and interferes with interstate commerce of the Frisco Railroad; that it is, in effect, a regulation of said commerce, and a direct interference with such commerce, and we took affidavits from various officials and employes of the road to ascertain just what division points are; what is their purpose and meaning, and what part they necessarily play in the interstate business of a railroad. It was established, and not denied by appellants at the hearing before the three judges, that the creation of division points along the line of an inter-

state railroad was primarily for the purpose of increasing the facilities for handling interstate and intrastate commerce; that division points are established at one place or the other, according to the necessity of traffic, and for the purpose of facilitating that traffic; that a division point established one year may not be the proper division point the following year; that, in early days, division points were more numerous and closer together by reason of the inferiority of the motive power and tracks, but in modern days, by reason of improved trackage and improved motive power, division points are constantly lengthened, and an effort is made wherever possible, in the interest of economy, to abandon as many division points as practical; that division points are never made for the convenience, of either the passenger or the shipper, but for the purpose of facilitating the commerce coming to the railroad; that the shipping public is constantly demanding better service and more dispatch in the movement of freight, and that the traveling public is demanding faster trains and fewer stops in order that they may reach the busy centers on interstate railroads, and that in order to satisfy this growing demand of the traveling and shipping public, great competition has arisen between railroads, and, therefore, it is necessary for any particular railroad to meet these demands in order to hold its business. It was also shown that if a division point is no longer pratical from a standpoint of business or economy, or from a standpoint of quick

service, great confusion will result in the management of trains; great delays will occur in the movement of freight and passengers if the company is not permitted to select the points at which it will establish divisions, or is not permitted to leave a point where a division has been established, and it was also shown that a large percentage of all cars moving on this railway company's line are interstate commerce; that the shops are a necessary incident to interstate commerce in order to keep the equipment in proper condition to move the cars, and in the natural course of things must, in nearly every case, be located at division points; that neither the traveling public nor the shipping public, nor those who have business with the railroad, are affected one way or the other either by the location of division points or the location of repair shops; that the public convenience is in no way served by such locations, but they are located primarily and purposely as necessary instrumentalities in commerce in order to make possible proper and efficient movement of that commerce. It was shown that by reason of the great increase in motive power and improvement in trackage, the employes of the railway company can go a greater distance in the same length of time than they could go under the old instrumentalities; that it is unnecessary to change crews on these interstate trains as often as under old conditions; that at division points, crews generally are changed, engines are overhauled and frequently changed; that all these things create delay

in transportation, and, therefore, the less division points the less delay on this account as to passengers and freight; that inasmuch as this particular railway runs its trains by continuous passage through many States of the Union, it is necessary to adjust its division points in each State to serve *through transportation*, and that this was a matter which required the judgment of experienced railroad men, familiar with the business of the road, familiar with its obligations to the public and familiar with the demands of the public.

It was shown that the division point at Sapulpa was established more than thirty years ago. At that time the Frisco Railroad was just entering the Indian Territory, and for many years Sapulpa was the end of the terminus of the line, and that for that reason it was natural and practical to establish a division point at Sapulpa, but that since then the population through which the railroad runs has vastly increased, and that the business interests of the country have very much expanded: that large cities have grown up on the line of the railroad: that Tulsa is now a city of more than 100,000 people, and only fourteen miles from Sapulpa, and that Oklahoma City, located on the line of said railway, is only about one hundred miles distant from Sapulpa; that the change in population, change in volume of the road's business, and the growth of cities—all these things have made it absolutely necessary, in the efficiency and economy of the service, to readjust division

points, to abandon some and acquire others, and that these changes in conditions now make it imperative that the railway company move its division points from Sapulpa, and that the holding of the division points and shops at Sapulpa will result in great loss annually to the railway company, which loss is stated in exact figures and terms.

In the examination of this statute it becomes necessary carefully to examine the subject matter of this legislation. It is not denied that in a proper case a State may pass a valid statute, affecting an instrumentality of interstate commerce, provided such instrumentality is not so necessary a part of interstate commerce and so intimately connected with the commerce itself as to be a part of that commerce. Of course, if the State statute touches directly interstate commerce, it falls, because whether Congress has acted or not, the State cannot regulate commerce as such, nor can it fetter or interfere with, in an unreasonable degree, that commerce, because a decided interference with interstate commerce by interfering with an instrumentality of commerce, is just the same as if the State had attempted, in express terms, to regulate that commerce. If the State statute acts upon commerce itself, it cannot stand. If it acts upon an instrumentality of commerce in such a way as to interfere directly with that commerce, the act still cannot stand.

From the statement of facts above mentioned, which

is conceded, we think, to be accurate in this case, division points must be selected with great care. They must be selected so as to co-ordinate and be in just accord with division points established in the other States through which the railroad runs. Division points and shops which are incidental thereto, are not like an engine or the track upon which the engine runs, but their relation to the commerce is more intimate, more comprehensive, and they are, indeed, it seems to us, an integral part of the commerce itself. We contend, therefore, that the subject matter of this legislation is so far a part of the commerce of the country, and so thoroughly enters into the life of that commerce and the discharge of the railway company's duty to the public, as to be beyond the power of the State to be considered as a proper subject of legislation, or regulation, or control. These division points and shops are more than mere naked instrumentalities of commerce, and any interference by the State or any power given to a State agency to interfere with the location of division points or shops, must be a direct interference with the interstate commerce of the railway company, and this apart from another vital question in this case, which we shall discuss later, that the State cannot operate a railroad against the consent of the railroad; that a railroad is private property, and the railroad company must, in the very essence of things, be left to manage its own property for the best interest of the public and the stockholders.

We now beg to cite some of the adjudications of this Court upon these questions. We shall make the citations as brief as possible, placing these cases in juxta-position in order to show the different utterances of the Court, and to find, if we can, from these decisions an established rule which will solve the question now under consideration.

In *Hannibal & St. Joseph Railroad Co.* v. *Husen*, 95 U. S. 465, 24 L. ed. 527, fifty years ago Mr. Justice Strong, speaking for the Court, said:

> "It may not (meaning the State) under the cover of exerting its police powers, substantially prohibit or burden either foreign or interstate commerce. Upon this subject the cases in 92 U. S., to which we have referred, are very instructive. In *Henderson* v. *Mayor, etc.*, the statute of New York was defended as a police regulation to protect the State against the influx of foreign paupers; but it was held to be unconstitutional, because its practical result was to impose a burden upon all passengers from foreign countries. And it was laid down that, 'In whatever language a statute may be framed, its purpose must be determined by its natural and reasonable effect.' * * * These cases, it is true, speak only of laws affecting the entrance of persons into a State; but the constitutional doctrine they maintain are equally applicable to interstate transportation of property. They deny validity to any State legislation professing to be an exercise of police power for protection against evils from abroad, which is beyond the necessity for its exercise wherever it interferes with the rights and powers of the Federal Government."

Again in the latter part of the opinion Mr. Justice Strong uses this language:

"Referring the statutes as mere police regulations, intended to protect domestic cattle against infectious disease, those courts have refused to inquire whether the prohibition did not extend beyond the danger to be apprehended, and whether, therefore, the statutes were not something more than exertions of police power. That inquiry, they have said, was for the Legislature and not for the courts. With this we cannot concur. The police power of a State cannot obstruct foreign commerce or interstate commerce beyond the necessity for its exercise; and under color of it, objects not within its scope cannot be secured at the expense of the protection afforded by the Federal Constitution. And as its range sometimes comes very near to the field committed by the Constitution to Congress, it is the duty of the courts to guard vigilantly against any needless intrusion."

Testing the legislation now under consideration by these rules, has not the statute gone far beyond its apparent object, and far into the realm which is in the exclusive jurisdiction of Congress? That it interferes with the commerce of the road, no argument seems necessary, and that there was no reasonable ground for the exercise of this particular power by the Legislature equally appears.

In *Crutcher* v. *Commonwealth of Kentucky*, 141 U. S. 47, 35 L. ed. 649, Mr. Justice Bradley said:

"To carry on interstate commerce is not a franchise or a privilege granted by the State; it is a right which every citizen of the United States is entitled to exercise under the Constitution and laws of the United States; and the accession of mere corporate facilities, as a matter of convenience in carrying on their business, cannot have the effect of depriving them of such

right, unless Congress should see fit to interpose some contrary regulation on the subject.

"It has frequently been laid down by this Court that the power of Congress over interstate commerce is as absolute as it is over foreign commerce."

Again, in the same opinion, he says:

"But the main argument in support of the decision of the Court of Appeals is that the act in question is essentially a regulation made in the fair exercise of the police power of the State. But it does not follow that everything which the Legislature of a State may deem essential for the good order of society and the well being of its citizens can be set up against the exclusive power of Congress to regulate the operations of foreign and interstate commerce."

In *Western Union Telegraph Co.* v. *Kansas*, 216 U. S. 1, 54 L. ed. 355, this language is used:

"But the disavowal by the State of any purpose to burden interstate commerce cannot conclude the question as to the fact of such a burden being imposed, or as to the unconstitutionality of the statute as shown by its necessary operation upon interstate commerce. If the statute, reasonably interpreted, either directly or by its necessary operation, burdens interstate commerce, it must be adjudged to be invalid, whatever may have been the purpose for which it was enacted, and although the company may be both interstate and local business. This Court has repeatedly adjudged that in all such matters the judiciary will not regard mere forms, but will look through forms to the substance of things. Such is an established rule of constitutional construction as the adjudged cases abundantly show."

Again, in *McNeill* v. *Southern Ry. Co.*, 202 U. S. 543, 50 L. ed. 1142, Mr. Justice White, speaking for the Court, said:

"Without at all questioning the right of the State of North Carolina, in the exercise of its police authority, to confer upon an administrative agency the power to make many reasonable regulations concerning the place, manner, and time of delivery of merchandise moving in the channels of interstate commerce, it is certain that any regulation of such subject made by the State, or under its authority, which directly burdens interstate commerce, is a regulation of such commerce, and repugnant to the Constitution of the United States. * * *

"The direct burden and resulting regulation of interstate commerce operated by an alleged assertion of State authority similar in character to the one here involved was passed upon by the Circuit Court of Appeals for the Sixth Circuit in *Central Stock Yards Co. v. Louisville & N. R. Co.*, 55 C. C. A. 63, 118 Fed. 113. The Court in that case was called upon to determine whether certain laws of Kentucky imposed a direct burden upon interstate commerce and were a regulation of such commerce, upon the assumption that those laws compelled a common carrier engaged in interstate commerce transportation to deliver cars of live stock, moving in the channels of interstate commerce, at a particular place beyond its own line, different from the general place of delivery established by the railway company. In pointing out that, if the legislation in question was entitled to the construction claimed for it, it would amount to a State regulation of interstate commerce, it was aptly and tersely said:

" 'It is thoroughly well settled that a State may not regulate interstate commerce, using the terms in the sense of intercourse and the interchange of traffic between the States. In the case at bar we think the relief sought pertains to the transportation and delivery of interstate freight. It is not the means of making a physical connection with other railroads that is aimed at, but it is sought to compel the cars and frieght received from one State to be delivered to another at a

particular place and in a particular way. If the Kentucky Constitution could be given any such construction, it would follow it could regulate interstate commerce. This it cannot do.' "

In the same case Mr. Justice White said:

"Viewing the order which is under consideration in this case as an assertion by the Corporation Commission of its general power to direct carriers engaged in interstate commerce to deliver all cars containing such commerce beyond their right-of-way and to a private siding, the order manifestly imposed a burden so direct and so onerous as to leave no room for question that it was a regulation of interstate commerce. On the other hand, treating the order as but the assertion of the power of the Corporation Commission to so direct in a particular case, in favor of a given person or corporation, the order not only was, in its nature, a direct burden and regulation of interstate commerce, but also asserted a power concerning a subject directly covered by the Act of Congress to regulate commerce and the amendments to that act, which forbid and provide remedies to prevent unjust discriminations and the subjecting to undue disadvantages by carriers engaged in interstate commerce."

In *Michigan Public Utilities Commission et al.* v. *Duke*, 266 U. S. 570, 69 L. ed. 445, the United States Supreme Court had to deal with what is known as Act 209 of the Public Acts of the State of Michigan, which imposed certain penalties upon plaintiff, who, under contracts with certain business firms, was transporting automobile bodies from Detroit, Michigan, to Toledo, Ohio. The act attempted to be enforced against the plaintiff provided that those similarly engaged in said State should furnish an indemnity

bond conditioned upon the payment of all just claims and liabilities resulting from injuries to persons, property, etc., by reason of such business. The Supreme Court in that case said:

> "A State has no power to fetter the right to carry on interstate commerce within its borders by the imposition of conditions or regulations which are unnecessary and pass beyond the bounds of what is reasonable and suitable for the proper exercise of its powers in the field that belongs to it."

In the case of *Lawton* v. *Steele*, 152 U. S. 133, 38 L. ed. 385, Mr. Justice Brown said:

> "To justify the State in thus interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals. The Legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations. In other words, its determination as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the courts."

We beg at this point to quote the language of the Supreme Court in an opinion delivered on the 15th of October, 1928, in the case of *Foster-Fountain Packing Co. et al.* v. *E. J. Haydel et al.*, but not yet reported:

> "One challenging the validity of a State enactment on the ground that it is repugnant to the commerce clause is not necessarily bound by the legislative de-

clarations of purpose. It is open to him to show that in their practical operation its provisions directly burden or destroy interstate commerce. *Minnesota* v. *Barber*, 136 U. S. 313, 319. *Brimmer* v. *Rebman*, 138 U. S. 78, 81. In determining what is interstate commerce, courts look to practical considerations and the established course of business. * * * Interstate commerce includes more than transportation; it embraces all the component parts of commercial intercourse among States. And a State statute, that operates directly to burden any of its essential elements is invalid. * * * A State is without power to prevent privately owned articles of trade from being shipped and sold in interstate commerce on the ground that they are required to satisfy local demands or because they are needed by the people of the State."

A careful application of the rules laid down in these various cases to determine whether or not a State statute, such as the one now under consideration, is valid, will discover, we think, that the statute under consideration is unique and extraordinary, both in the character of language used and the undisclosed purpose for which it was enacted. It is settled by the decisions above quoted that, in order to make this statute a valid exercise of police power, it *must be necessary;* it must be passed to serve some definite *public purpose* within State police power; it must not be arbitrary; must not seriously interfere with the management of private business, and it must not trench, in any way, upon the commerce power of Congress. We say, with great respect, that this statute is wholly unnecessary; that it does not serve any great public purpose; that it does not serve the public in its relation to railway com-

panies; that it does not serve the employe in his relation to railway companies; that it does not serve the shipper or the passenger, but can only, in its necessary operation as a practical piece of legislation, serve to benefit the inhabitants of a particular place, who have perhaps expended money and erected property on the faith of the location of a division point or shops at a particular place; that it is an attempt to interfere with the business of the railway company; that it is an attempt to regulate certain portions of that business which enter into the obligations of interstate railway companies to the public; that it is a subject matter, in its very nature, with which the State has no right to deal; and the above cases further emphasize the propostition that any act of a State Legislature which *interferes in a pronounced degree with interstate commerce*, is, in effect, a regulation of that commerce; that any State statute which fetters interstate commerce or which, in its necessary operation, fetters that commerce, is an invalid exercise of State power. A direct burden on interstate commerce or an unwarranted interference with interstate commerce, created and committed by a State, is *the equivalent of a regulation* of commerce which is exclusively within the domain of Federal power. We cannot see how a judicial mind, seeking rational conclusions from established facts, can reach a conclusion that this particular statute does not interfere seriously with interstate commerce; that it does not burden interstate com-

merce, and, therefore, that it is not a regulation of interstate commerce.

Cases distinctly analogous to the case at bar have been considered by this Court, and we beg now to cite some of those cases.

In *Mississippi R. Commission* v. *Illinois Central R. Co.*, 203 U. S. 335, 51 L. ed. 209, this Court was considering the validity of an order of the Mississippi Railroad Commission requiring a railway company to stop its interstate mail trains at a specified county seat where proper and adequate facilities were otherwise afforded that station, and speaking through Mr. Justice Peckham, said:

> "The order cannot be viewed alone in the light of ordering a stop at one place only, which might require not more than three minutes, as asserted. It is the question whether these trains can be stopped at all at any particular station when proper and adequate facilities are otherwise afforded such train station. If the Commission can order such a train to be stopped at a particular locality under such circumstances, then it could do so as to other localities, and in that way the usefulness of a through train would be ruined and the train turned from a through to a local one in Mississippi. The Legislature of a State could not itself make such an order, and it cannot delegate the power to a Commission to do so, in its discretion, when adequate facilities are otherwise furnished.
>
> "The transportation of passengers on interstate trains as rapidly as can with safety be done is the inexorable demand of the public who use such trains. Competition between great trunk lines is fierce and at times bitter. Each line must do its best even to

obtain its fair share of the transportation between States, both of passengers and freight. A wholly unnecessary, even though a small, obstacle ought not in fairness to be placed in the way of an interstate road, which may thus be unable to meet the competition of its rivals."

Why, may we ask, was the statute there held invalid? It was because, in its necessary operation and application, it interfered with interstate commerce; it interfered with the time to be made by the railway company; it interfered with the quick delivery of passengers and freight to given points on that interstate railroad; it prevented the railroad from meetin the competition of its rivals, and such a provision was wholly unnecessary if local facilities were furnished. If there is no power on the part of a State to require an interstate train, carrying the United States mail, to stop at a given point because of an unnecessary burden upon interstate commerce, how much less warrant there seems to be for the State to assume to determine where a railway company shall place its division points and its shops. It seems to us that the interference by a State with the time to be made by an interstate train is very much less in gravity and scope than the interference of a State with the establishment by a railway company of division points and shops.

In *Southern Railway Co.* v. *King*, 217 U. S. 524, 54 L. ed. 878, which involved a statute regulating the approach of interstate trains to dangerous crossing, signals to be given, etc., Mr. Justice Day said:

"It is consistent with the former decisions of this Court, and with a proper interpretation of constitutional rights, at least, in the absence of congressional action upon the same subject matter, for the State to regulate the manner in which interstate trains shall approach dangerous crossings, the signals which shall be given, and the control of the train which shall be required under such circumstances. Crossings may be so situated in reference to cuts or curves as to render them highly dangerous to those using the public highways. They may be in or near towns or cities, so that to approach them at a high rate of speed would be attended with great danger to life or limb. On the other hand, highway crossings may be so numerous and so near together that to require interstate trains to slacken speed indiscriminately at all such crossings would be practically destructive of the successful operation of such passenger trains. Statutes which require the speed of such train to be checked at all crossings so situated might not only be a regulation, but also a direct burden upon interstate commerce, and, therefore, beyond the power of the State to enact."

The constitutionality of this particular statute was sustained, but the observation of Mr. Justice Day above quoted shows that this statute went to the very limit of police power; that such unusual and necessary requirement with reference to the speed of trains would be a direct burden upon interstate commerce.

Mr. Justice Holmes and Mr. Justice White dissented in that case. Mr. Justice Holmes used this language on page 874:

"It seems to me a miscarriage of justice to sustain liability under a statute which possibly, and I think

probably, is unconstitutional, until the facts have been heard which the petitioner alleged and offered to prove. I think that the judgment should be reversed."

Again, in *Illinois Central R. Co.* v. *People of Illinois*, 163 U. S. 142, 41 L. ed. 107, it is said:

> "A State statute requiring a fast mail train carrying interstate passengers and the United States mail over an interstate highway established by authority of Congress, to delay the transportation of such passengers and mails by turning aside from the direct interstate route, and running to a station three and one-half miles away from a point on that route and back again to the same point, because such station is the county seat, for the interstate travel to and from which the railroad company furnishes other and ample accomodation, is an unconstitutional interference with and obstruction of interstate commerce and of the passage of the mails."

We respectfully submit, therefore, that the difference between an effort on the part of the State Legislature to stop interstate trains at given points differs not in principle, but only in degree, from its asserted power to authorize a state agency to determine whether a railway company shall move its division point or shops, the latter power asserted being much more direct in its movement against the commerce power of the National Government than the former. If the Legislature has the power to confer by statute upon a Corporation Commission the right to pass upon whether a railway company shall move its division point or shops, it would follow that it would have the same power to confer upon the Commission the power to say at

what point the railway company shall originally establish its division point or shops, thus taking away from the railway company, undoubtedly, the power best to manage and conduct its business in behalf of the public and its stockholders.

In each of these latter cases Your Honors will take notice that if proper local facilities were furnished by the railway company, the argument was at an end. In this case it is shown by affidavits that proper facilities for serving the shipping and traveling public, for serving the patrons of the road, and for serving the people of Sapulpa, as patrons of the road, will be left after the division points and shops are moved. If service in the furnishing of facilities by a railway company at the points where the Legislature seeks to stop interstate trains, is the answer to any attempted exercise of such power by the State, then certainly if reasonable facilities for service are left by a railway company at a place from which it desires to remove its division point and shops, the lack of power on the part of the Legislature to touch this question at all is equally apparent. It is not questioned in this case that the removal of the shops and division point from Sapulpa will still leave ample railroad facilities to fulfill every duty which the railway company owes to anybody at that particular place, and the remark of Mr. Justice McReynolds in *St. Louis & San Francisco Ry. Co.* v. *Public Service Commission of Missouri*, 254 U.

S. 535, 65 L. ed. 389, becomes of importance in considering this view of the subject. The learned Justice said:

> "The fact of local facilities this Court may determine, such fact being necessarily involved in the determination of the federal question whether an order concerning an interstate train does or does not directly regulate interstate commerce by imposing an arbitrary requirement."

We contend that, as a matter of common knowledge, division points and shops have nothing to do with local facilities to be furnished by a railway company at a given point on its line, and that even if we are wrong in this, and the court cannot deduce from the language of this statute that it has nothing to do with local facilities, yet the undisputed facts in this case are that sufficient local facilities will be left if said division point and shops are moved.

We have endeavored to demonstrate to the Court that this state statute, for all the reasons above asserted, cannot stand. It seems to us that its invalidity is apparent when it is measured and judged by the adjudications of this Court. Finally we say, with reference to the face of this statute, that it does not disclose any purpose which is within the purview of the police power of the State; that it arbitrarily and unjustly enters a field which is prohibited by the commerce clause of the Constitution of the United States; that it has given the power to the Corporation Commission to *operate* the business of the railway companies. We have searched diligently the statutes and de-

cisions of other States and we have found no counterpart to the state statute now under consideration. It seems that all the other sovereign States of this Union have been willing for railway companies to choose their own division points and locations for their machine and repair shops. The only State that has, by statute, touched it at all, so far as we can find, is the State of Texas, and inasmuch as a decision of this Court construing that statute is much relied upon by the appellants in this cause, we beg now to consider the Texas statute and the decision of this Court with reference to the same, and we feel that we can make no better or more lucid examination of that case, and the other cases cited by appellants to sustain their contention, than by quoting from the opinion of Judge Van Valkenburgh, one of the three Judges who sat in this case, found beginning on page 101 of the transcript:

> "We proceed to a consideration of the merits of the controversy.
>
> "*Western & Atlantic Railroad* v. *Georgia Public Service Commission et al.*, 267 U. S. 493, had to do with a bill to enjoin a state commission from enforcing an order requiring the plaintiff railroad to maintain service on an industrial switch track. Intrastate switching service was involved. It was held that under Section 402 a railroad company could not appeal from an order of a state commission requiring it to continue switching service on the ground of discrimination until it had invoked the investigation and decision of the Interstate Commerce Commission on this point. Also, the power to order its establishment or abandonment of such side tracks, though employed largely for its

interstate commerce, is not with the Interstate Commerce Commission, but with the States. Under the act the Federal Commission cannot order abandonment of service exclusively intrastate. (*State of Texas* v. *Eastern Texas Railroad Company et al.*, 258 U. S. 204.) This case, therefore, has no application to the point now under consideration.

"*Henderson Water Co.* v. *Corporation Commission of North Carolina et al.*, 269 U. S. 278, was an appeal under Section 266 of the Judicial Code from an order refusing temporarily to enjoin the enforcement, as confiscatory, of rates established by the Commission until the period of test prescribed in the order had expired. The Commission had allowed a partial increase and reserved to the water company the right to apply for further relief at the end of a test period. It was held that the company must exhaust its remedy with the Commission before suing in the district court. This case announces a principle frequently laid down in rate cases, and has no bearing upon the issue now before us.

"*International & Great Northern Railway Co. et al.* v. *Anderson County et al.*, 246 U. S. 424, was decided upon the facts peculiar to that case. It was held that foreclosure and sale of a railroad in a Federal Court will not relieve the purchaser from a contractual or statutory duty which rested on its predecessors under state law, to maintain offices and shops at a particular place. There the petitioning railroad was organized under the laws of State of Texas, and was, therefore, a Texas corporation. The Office-Shops Act of Texas, containing a prohibition against removal of offices and shops located by contract within a county in consideration of county bond aid, was in effect at the time the railway company took out its charter under general laws that expressly subject it to the limitations imposed by existing law. It was made a condition of incorporation that this restriction should be accepted.

The decision was expressly based upon the special facts there appearing. The Court said:

" 'We are not prepared to say that in this instance the State has transcended its powers.'

"The case of *Texas & Pacific Railway Company* v. *Marshall*, 136 U. S. 393, more nearly applies to the case under consideration. In that case it appears that:

" 'The City of Marshall agreed to give to the Texas & Pacific Railway $300,000 in county bonds, and 66 acres of land within the city limits for shops and depots; and the company "in consideration of the donation" agreed "to permanently establish its eastern terminus and Texas offices at the City of Marshall," and "to establish and construct at said city the main machine shops and car works of said railway company." The city performed its agreements, and the company, on its part, made Marshall its eastern terminus, and built depots and shops, and established its principal offices there. After the expiration of a few years, Marshall ceased to be the eastern terminus of the road, and some of the shops were removed. The city filed this bill in equity to enforce the agreement, both as to the terminus and as to the shops; *held*:

" '(1) That the contract on the part of the railway company was satisfied and performed when the company had established and kept a depot and offices at Marshall, and had set in operation car works and machine shops there, and had kept them going for eight years and until the interests of the railway company and of the public demanded the removal of some or all of these subjects of the contract to some other place.

" '(2) That the word "permanent" in the contract was to be construed with reference to the subject-matter of the contract, and that, under the circumstances of this case it was complied with by the establishment of the terminus and the offices and shops contracted for, with no intention at the time of removing or abandoning them.

"'(3) That if the contract were to be interpreted as one to forever maintain the eastern terminus, and the shops and Texas offices at Marshall, without regard to the convenience of the public, it would become a contract that could not be enforced in equity.

"'(4) That the remedy of the city for the breach, if there was a breach, was at law.'

"The rule announced in this case has never been modified nor impaired. It is cited with approval in *Armour & Co. et al.* v. *City of Dallas et al.*, 255 U. S. 280. To us it seems inconceivable that the managerial control of an interstate railway over the location of its shops and division points, for the purpose of co-ordinating its facilities in the discharge of its interstate commerce business, should be made subject to the control of the individual States acting in the interest of local communities and to the disadvantage of public convenience generally. It has been consistently held that interstate rates cannot be made the subject of private contract. *New York, New Haven & Hartford R. R. Co.* v. *Interstate Commerce Commission*, 200 U. S. 361; *Armour Packing Co.* v. *United States*, 209 U. S. 56.

"The same principle, in our judgment, applies generally to all essential instrumentalities of interstate commerce.

"As said by the Supreme Court, in the instant case, the federal power is paramount. Upon the undisputed allegations of the bills, with the attending presumptions the removal of these shops and this division point is demanded in the interest of economy in operation and improved service to the shipping and traveling public. The policy of the railway in this regard accords with the spirit of latest progressive legislation for maintaining the efficiency and economical operation of an interstate commerce railway system which serves both the States and the Nation. (*Dayton-Goose Creek Ry. Co.* v. *United States*, 263 U. S. 456-485.) It

follows that the motion to dismiss will be overruled and that in conformity with the terms of this submission a decree will be entered in favor of complainant."

The facts in the present case which were pertinent to the inquiry as to the validity of the Oklahoma statute, show clearly that the Oklahoma statute seriously interferes with the interstate commerce of the Frisco Railway Company. The facts in the case show that this statute, most probably, was passed to meet conditions at Sapulpa. It appears to us to be an unreasonable statute; an arbitrary statute; a discrimininting statute, and that it cannot stand the test of critical judicial review. If railway companies doing interstate business are required by Federal law to run their railroads economically and to the best interest of the public, and if they are required, under the general law, to conduct said railroads to the best interest of the public, then to such railway companies must be committed the exercise of judgment and discretion in adopting the proper methods to bring about such results. If the States are permitted to take charge of railway companies by requiring such companies to operate through narrow, restrictive, unnecessary and unreasonable regulations, the usefulness of such railroads, as great agencies of commerce, will be impaired and, sooner or later, destroyed.

II.

The Oklahoma Statute now under consideration is unconstitutional and void because it is an arbitrary and unreasonable exercise of the police power, and this vice appears on the face of the statute.

The police power of the various States of this Union, the manner of its exercise, and the limitation of its exercise, have been the subject of consideration by this Court from the beginning of the government. No precise definition of what is designated as police power has ever been attempted by any court, and whether there has been a proper and lawful exercise of such police power depends always upon the facts and conditions of the particular case under consideration. Whatever may be the origin and source of the police power of any sovereignty, and especially of the States of this Union, it has been distinctly pronounced in practically every State in the Union, by the lower Federal Courts, and by this Court, that its exercise must be reasonable; that it must not be arbitrary, and that it must have some reasonable relation to the class of subjects included in the police power. The authorities upon this subject have been collated with great care in Sections Nos. 227 and 228 of the 6th volume of Ruling Case Law, and to save time and necessity of quoting at length the cases there cited, we beg leave to quote in full the text. Beginning with the fourth line of Section 227, the text is as follows:

"The law must tend, in a degree that is perceptible

and clear, toward the preservation of the public welfare, or toward the prevention of some offense or manifest evil, or to the furtherance of some object within the scope of the police power. The mere assertion by the Legislature that a statute relates to the public health, safety or welfare does not in itself bring that statute within the police power of a State; for there must be obvious and real connection between the actual provisions of a police regulation and its avowed purpose, and the regulation adopted must be reasonably adapted to accomplish the end sought to be attained. One application of the familiar rule that the validity of an act is to be determined by its practical operation and effect and not by its title or declared purpose is that a constitutional right cannot be abridged by legislation under the guise of police regulation; since the Legislature has no power, under the guise of police regulations, to invade arbitrarily the personal rights and personal liberty of the individual citizen, or arbitrarily to interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations, or to invade property rights."

Again in Section 228, commencing near the top of the page, this language is used:

"All statutory restrictions of the use of property are imposed upon the theory that they are necessary for the safety, health, or comfort of the public. Accordingly if a restriction or regulation is without reason or necessity it cannot be enforced."

To sustain these different propositions cited in the text above quoted, cases from nearly every State in the Union have been cited, and a close examination of those cases by the writers of this brief, has convinced them that the cases are carefully digested.

We pause here to call attention to and quote from cer-

tain leading cases decided by this Court which laid down the rule with even greater clearness and conciseness than the opinions from the State courts. We call attention to the case of *Lochner* v. *New York*, 198 U. S. 45, 49 L. Ed. 937, where Mr. Justice Peckham, speaking for the Court, used this language:

> "It must, of course, be conceded that there is a limit to the valid exercise of the police power by the State. There is no dispute concerning this general proposition. Otherwise the 14th Amendment would have no efficacy and the Legislatures of the States would have unbounded power, and it would be enough to say that any piece of legislation was enacted to conserve the morals, the health, or the safety of the people; such legislation would be valid, no matter how absolutely without foundation the claim might be. The claim of the police power would be a mere pretext—become another and delusive name for the supreme sovereignty of the State to be exercised free from constitutional restraint. This is not contended for. In every case that comes before this Court, therefore, where legislation of this character is concerned, and where the protection of the Federal Constitution is sought, the question necessarily arises: Is this a fair, reasonable, and appropriate exercise of the police power of the State, or is it an unreasonable, unnecessary, and arbitrary interference with the right of the individual to his personal liberty, or to enter into those contracts in relation to labor which may seem to him appropriate or necessary for the support of himself and his family?
>
> "This is not a question of substituting the judgment of the Court for that of the Legislature. If the act be within the power of the State it is valid, although the judgment of the Court might be totally opposed to the enactment of such a law. But the question would still remain: Is it within the police power of the State? and that question must be answered by the Court."

We call attention to the case of *Lawton* v. *Steele*, 152 U. S. 133, 38 L. Ed. 385. This case is a leading case upon this subject, and has been cited time and again by this Court, and most frequently by the courts of the various States passing upon the limits of the police power. Near the bottom of page 388, Mr. Justice Brown who delivered the opinion of the Court, uses this language:

> "To justify the State in thus interposing its authority in behalf of the public, it must appear, first, that the interest of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals. The Legislature may not, under the guise of protecting the public interest, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations. In other words, its determination as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the courts."

In this same case Mr. Chief Justice Fuller, on page 391, said:

> "The police power rests upon necessity and the right of self-protection."

Again in *C., B. & Q. Ry.* v. *Illinois*, 200 U. S. 561, 50 L. Ed. 596, this Court speaking through Mr. Justice Harlan, used this language:

> "If the means employed have no real, substantial relation to public objects which government may legally accomplish—if they are arbitrary and unreasonable, beyond the necessities of the case, the judiciary will

disregard mere forms, and interfere for the protection of rights injuriously affected by such illegal action."

Again on page 610, Justice Harlan says:

"There are, unquestionably, limitations upon the exercise of the police power which cannot, under any circumstances, be ignored."

We call special attention to the language of Mr. Justice Brewer in his dissenting opinion in that cause, on page 612, not for the purpose of attempting to challenge or weaken the opinion of the majority in that cause, but to bring out, if possible, more clearly limitations upon the police power of the States. Commencing at the bottom of that page the learned Justice said:

"It seems to me the police power has become the refuge of every grievious wrong upon private property. Whenever any unjust burden is cast upon the owner of private property which cannot be supported under the power of eminent domain or that of taxation, it is referred to the police power. But no exercise of the police power can disregard the constitutional guaranties in respect to the taking of private property, due process, and equal protection, nor should it override the demands of natural justice."

We have quoted at some length from these opinions which are, of course, familiar in every detail to this Court, but which we are compelled to present in order, if possible, to sustain the merit and justice of our contention. We say, therefore, that this statute now under consideration is an arbitrary, unnecessary and capricious exercise of legislative power. To what known and conceded source of the

police power can this statute be traced? What public purpose within the purview of the police power is sought to be established and enforced by this statute? It cannot be referred to the police power as to health, because the health either of the employes of a railroad or the public at large cannot be involved in the naked question as to whether or not the railway company ought to move its division points or shops. It cannot be placed upon the morals or the safety, or the public welfare, because the question as to whether division points or shops shall be moved does not, and cannot involve, it seems to us, either the question of morals, safety, or public welfare. The truth is, on the very face of things, the location of division points or of shops, is a matter touching the conduct of a railroad's business, and must be confided to the business judgment of such railroad.

Recurring to the language of the adjudications above cited, does this statute, by its terms, tend, in a degree that is perceptible and clear, toward the preservation of the public welfare? Is it designed to accomplish a purpose properly falling within the scope of the police power? Does it not, on its face, show an arbitrary interference with the right of a railroad company to operate and control its own business? Does it, anywhere, show, on its face, from the most liberal construction, that it was enacted for the safety, health, comfort or welfare of the public? Does it not, on its face, show that it is a restriction or regulation without reason or necessity? We, therefore, respect-

fully submit that this statute under consideration is arbitrary, unreasonable, unnecessary for the promotion of public good or for the protection of public right; that it is an unjustified interference with the right of a railway company so to conduct and manage its property as to best serve the public. If this be true, then such statute is unconstitutional as an unauthorized exercise of police power, and the learned gentlemen who oppose us in this case have attempted to justify this statute solely as a lawful exercise of police power by the State.

III.

This Oklahoma Statute is a denial of due process of law and equal protection of the law under the Fourteenth Amendment to the Constitution of the United States.

We believe it is thoroughly settled that a corporation is within the protective terms of said amendment as to due process and equal protection. This being so, this railway company here and now contends that this statute unjustly discriminates between this railroad and other railroads in exactly the same position and engaged in exactly the same business; that a classification has been made which is unlawful, and which violates the Constitution of the United States.

Again we call attention to the substance of the statute. It declares that wherever division points and shops of any

particular railroad have been located at a certain place for as much as five years, such railway company cannot move such division points or shops without the consent of the Corporation Commission, thereby leaving all railway companies, whose division points and shops have been located at a particular point for less than five years, free and unrestrained to move without the consent of the Corporation Commission, and to any place they see fit. We realize as to whether the question of classification in a given case is violative of the equal protection of the laws is a difficult one, and has been the source of much debate and consideration by this Court, but the general rule which determines such question has been very clearly stated by this Court in numerous decisions. We quote from the case of *Soon Hing* v. *Crowley*, 113 U. S. 703, 28 L. ed. 1145, where Mr. Justice Field, speaking for the Court, said:

> "The discriminations which are open to objection are those where persons engaged in the same business are subjected to different restrictions, or are held entitled to different privileges under the same conditions. It is only then that the discrimination can be said to impair that equal right which all can claim in the enforcement of the laws."

We beg to cite the case of *State of Iowa* v. *Garbroski*, 111 Iowa 496, and found in 56 L. R. A. 570, with notes, where Justice Ladd, in delivering the opinion of the Court, renders a lengthy and very learned opinion, citing cases from other States and from this Honorable Court to sus-

tain it. On page 571 of the case in 56 L. R. A., the Iowa Reports not being accessible to us, that Court said:

"The extent to which division may be carried without running into special, or what is known as 'class' legislation, is sometimes difficult to determine. All the authorities agree that the distinction in dividing may not be arbitrary, and must be based on differences which are apparent and reasonable. Thus, the Supreme Court of Minnesota, in *Nichols* v. *Walter,* 37 Minn. 264, 33 N. W. 800, declared: 'The true, practical limitation of the legislative power to classify is that the classification shall be upon some apparent natural reason—some reason suggested by necessity; by such a difference in the situation and circumstances of the subjects placed in different classes as suggests the necessity or propriety of different legislation with respect to them.' This was approved in *Lavallee* v. *St. Paul, M. & M. R. Co.,* 40 Minn. 249, 41 N. W. 974. In *Johnson* v. *St. Paul & D. R. Co.,* 43 Minn. 222, 8 L. R. A. 419, 45 N. W. 157, the same Court, through Mitchell, J., said: 'It has been sometimes loosely stated that special legislation is not class, "if all persons brought under its influence are treated alike under the same conditions." But this is only half the truth. Not only must it treat alike, under the same conditions, all who are brought "within its influence," but in its classification it must bring within its influence all who are under the same conditions.' In *State ex rel Richards* v. *Hammer,* 42 N. J. L. 439, the Supreme Court of New Jersey held that 'the true principle requires something more than a mere designation by such characteristics as will serve to classify, for the characteristics which thus serve as the basis of classification must be of such a nature as to mark the objects so designated as peculiarly requiring exclusive legislation. There must be substantial distinction, having a reference to the subject-matter of the proposed legislation, between the objects or places embraced in such legislation and the objects or places excluded. The marks of distinction

on which the classification is founded must be such, in the nature of things, as will in some reasonable degree, at least, account for or justify the restriction of the legislation.' The Supreme Court of Tennessee, in *Sutton* v. *State,* 96 Tenn. 696, 33 L. R. A. 589, 36 S. W. 697, very tersely states the law to be that legislation, to be constitutional and valid, 'must possess each of two indispensable qualities: First, it must be so framed as to extend to and embrace equally all persons who are or may be in the like situation and circumstances; and, secondly, the classification must be natural and reasonable, nor arbitrary and capricious.' "

The Court then cites numerous cases, and after giving such citations, continues:

"In the last case (being the case of *Magoun* v. *Illinois Trust & Savings Bank,* 170 U. S. 283, 42 L. ed. 1037) Justice McKenna, speaking of the equal protection of the laws required by the Fourteenth Amendment to the Constitution of the United States, said: 'It does not prohibit legislation which is limited either in the objects to which it is directed, or by the territory within which it is to operate. It merely requires that all persons subjected to such legislation shall be treated alike under like circumstances and conditions, both in the privileges conferred and the liabilities imposed.' The same Court, speaking through Justice Brewer, in *Gulf, C. & S. F. R. Co.* v. *Ellis,* 165 U. S. 150, 41 L. ed. 666, declared that 'the differences which will support class legislation must be such as in the nature of things furnish a reasonable basis for separate laws and regulations.' "

In this opinion by Mr. Justice Ladd, he was considering a statute of Iowa which exempted all persons who had served in the Union Army or Navy from the provisions requiring all persons peddling goods outside of a city or

town to pay a license tax. As to this classification, the learned Judge said:

> "The classification here attempted rests solely on a past and completed transaction, having no relation to the particular legislation enacted. All citizens are divided into two classes—those who served in the Army and Navy thirty-five years ago, and all those who did not. True, as suggested, the veterans came from no particular class; but the trouble with this statute is that it attempts to make of them a class in legislation, in the operation of which there can be no substantial distinction between them and others."

In conclusion we call attention to the case of *Gulf, Colorado & Santa Fe Railroad Co.* v. *Ellis*, 165 U. S. 150, 41 L. ed. 666. Mr. Justice Brewer rendered the opinion of the Court in that case, and it is most certainly a powerful and illuminating examination of the question now under consideration. In the body of that opinion, Justice Brewer says:

> "No duty rests more imperatively upon the courts than the enforcement of those constitutional provisions intended to secure that equality of rights which is the foundation of free government."

And later on, the learned Justice quotes with approval the language of Judge Black in *State* v. *Loomis*, 115 Mo. 307, which is as follows:

> "Classification for legislative purposes must have some reasonable basis upon which to stand. It must be evident that differences which would serve for a classification for some purposes furnish no reason whatever for a classification for legislative purposes. The differences which will support class legislation

> must be such as in the nature of things furnish a reasonable basis for separate laws and regulations. Thus, the Legislature may fix the age at which persons shall be deemed competent to contract for themselves, but no one will claim that competency to contract can be made to depend upon stature or color of the hair. Such a classification for such a purpose would be arbitrary and a piece of legislative despotism, and therefore not the law of the land."

We think it useless to cite further authorities as to the rule to be adopted in determining when unlawful classification has been made. In the State of Oklahoma there are many interstate railroads. Some of them older, and some younger than the others. The Legislature has, by arbitrary action, fixed a period of five years under this statute, separating these railroads, placing a burden by virtue of said arbitrary time of five years upon some of these railroads, and leaving the other class unaffected and untouched by said burden. As said by the Supreme Court of Minnesota in the case of *Johnson* v. *St. Paul & D. R. Co.,* 43 Minn. 222, quoted by Judge Ladd in the foregoing opinion:

> "Not only must it treat alike, under the same conditions, all who are brought 'within its influence,' but in its classification it must bring within its influence all who are under the same conditions."

All the railroads in Oklahoma do the same kind of business. They carry passengers and they carry freight, and yet if one of these railroads has established its division point and shops at a given place for a period of less than five years, it need not go to the Corporation Commis-

sion to get permission to move these division points, but if it so happens that an older railroad, which has more than five years ago established its division point and shops at a certain place, desires to move, it must get the consent of the Corporation Commission to do so. It seems to us that this is an unjust classification and put a burden upon some railroads that is not put upon others when all such railroads are engaged in identically the same business. However this may be, we feel that we are certainly right that this distinction or classification is purely arbitrary and not based on differences which are apparent and reasonable. It seems to us to be clear that there is not such a difference in the situation and circumstances of the subjects placed in different classes as suggests the necessity or propriety of different legislation with respect to them.

In this connection we desire to call the Court's attention to counsel's point to the effect that a State may legislate to protect the health of railroad employes, and they say that the act in question is a valid exercise of the State's police power by reason of the sanitary provision contained in said act. If the validity of the act in question is to depend solely upon the sanitary provision contained therein, then we say the act is discriminatory and void and creates a classification of the railroad employes in the State of Oklahoma so unreasonable and unjustified that it cannot be sustained. The State may legislate to protect the health of railroad employes, but it cannot unreasonably and arbi-

trarily classify the employes and then legislate to protect only those included within an unjustified and arbitrary classification. If the sanitary provision as contained in said act is depended upon for the validity of said act, then we have legislation that divides railroad shops and division points within the State into two arbitrary classes, towit: one class of shops and division points that have been located at given points for five years or more; another class of shops and division points that have been located at given points for less than five years. The act provides that all those shops and division points included within the first class cannot be removed until the places to which they are to be removed are declared, by the Corporation Commission, to be sanitary. All those included within the second class, however, may be removed at will without any supervision from the Corporation Commission. What relation has the period of five years with the effect that an unsanitary locality will have upon railroad employes? Would it not be just as injurious to the health of those employes engaged at shops which have been located at a place for less than five years to be moved into an unsanitary vicinity as it would be to those employes engaged at shops which have been located at a given point for more than five years? That such a classification is unjustified, capricious, arbitrary and discriminatory, it seems to us, is so clear as to make further argument along this line unnecessary.

We beg, before closing the argument on this, to call

special attention to the opinion of Mr. Justice Sutherland in the case of *Louisville Gas & Electric Co.* v. *Coleman*, rendered on April 30, 1928, but not yet reported. The opinion in that case, we think, fully sustains the position which we have taken in the argument above.

IV.

The next attack which we make upon this statute is that the Legislature selected an arbitrary point of time, and from that arbitrary point of time changed the rules of evidence, and by reason of such arbitrary point of time so selected, made and declared a prima facie case against removal by the railway company.

We do not contend, of course, that ordinarily any citizen has a vested right in the rules of evidence. These rules may be changed to meet given cases, and the conceded existence of one fact may, in proper cases, be made *prima facie* evidence of the existence of a main fact to be proved or determined, but this right of the Legislature is not arbitrary, and if the pretended exercise of the right appears clearly to be arbitrary, the legislation cannot stand the test. This doctrine is not new to the courts. This matter is considered and the principal cases dealing with the proposition are cited and quoted in the case of *People* v. *Mallan*, 222 N. Y. 456, 119 N. E. 102. In that case the Court declared that in the matter now under consideration the true rule is:

> "In the exercise of this power numerous statutes have been enacted providing that proof of one fact shall be *prima facie* evidence of the main fact in issue;

and where the inference is not purely arbitrary, and there is a rational relation between the two facts, and the accused is not deprived of a proper opportunity to submit all the facts bearing upon the issue, it has been held that such statutes do not violate the requirements of due process of law."

Attorneys for appellants in this cause make little discussion of this proposition, but content themselves with citing *James-Dickinson Farm Mortgage Co. et al.* v. *Harry*, decided by this Court January 10, 1927, and not officially reported. We submit that this latter case does not control the situation here. The statute considered in this last case was one to protect the people of the State against fraud, and this is one of the most ancient sources of the police power. It was contended in that case that the statute violated the due process clause of the Fourteenth Amendment, in providing that whenever the kind of promise appearing in that case has not been complied with by the party making it within a reasonable time, "it shall be presumed that it was falsely and fraudulently made, and the burden shall be on the party making it to show that it was made in good faith, but was prevented from complying therewith by the act of God, the public enemy, or by some equitable reason."

Here there was a clear rational relation between the failure to keep the promise and the fraud inhering in its making, which was the ultimate fact to be found. The learned Justice used this language:

"It is well settled that a State may consider proof

of one fact presumptive evidence of another, if there is a rational connection between them,"

and the learned Justice cited the case of *Hawes* v. *Georgia*, 258 U. S. 1, 66 L. ed. 431. In that case Mr. Justice McKenna used the following language, and by an application of this language to the case at bar we cannot escape the conclusion that this arbitrary presumption, raised in this statute by reason of a certain point of time, denies to certain railway companies the equal protection of the law under the Fourteenth Amendment:

> "In *Hawkins* v. *Bleakly*, 243 U. S. 210, 61 L. ed. 678, it is said: 'The establishment of presumptions, and of rules respecting the burden of proof, is clearly within the domain of the State Governments, and that a provision of this character, not unreasonable in itself and not conclusive of the rights of the party, does not constitute a denial of due process of law.'
>
> "Undoubtedly there must be a relation between the two facts. That is, if one may evidence the other, there must be connection between them—a requirement that reasoning insists on, and, necessarily, the law."

Again Justice McKenna in the same case says:

> "We agree, therefore, with the Supreme Court of the State, that the existence upon land of distilling apparatus, consisting of the still itself, boxes and barrels, has a natural relation to the fact that the occupant of the land has knowledge of the existence of such objects and their situation."

Testing this statute by these rules and observations laid down by Mr. Justice McKenna, can anyone say that there is a rational relation between five years' occupation and the right to remove? What has the period of occupa-

tion to do with this right to remove? By what course of reasoning can we say that five years flat raises a presumption against the right to remove, but four years, eleven months and twenty-nine days raises no such presumption? Why is not the point of time selected as a basis for changing the rules of evidence and fixing a presumption against removal, purely arbitrary and capricious? This Honorable Court and many of the Courts of the Union, as we shall show under another subject in a later portion of this brief, have held that although a railway company may make a contract to locate shops or division points perpetually at a given place, such contract is opposed to public policy. An injunction will not lie to prevent the railway company from moving such division points or shops, especially where the railway company has remained there for a reasonable length of time.

In the celebrated case of *Texas & Pacific Railway Co.* v. *Marshall,* 136 U. S. 393, 34 L. ed. 385, this Court, speaking through Mr. Justice Miller, said that six years was a reasonable time. This case and all cases of a kindred character, were based upon the salutary proposition that a railway company owes its highest duty to the public, and next to that, to its stockholders, and if ever the exigencies of the public require a change in division points and shops, all private claims and rights must yield to such exigencies. It would, therefore, seem to follow that the longer a railway company had occupied a given place with its division

points or shops, the more certain it would be that exigencies would arise which required a removal in the interest of the public. Therefore, the presumption, if any existed at all, would be in favor of removal rather than against it. Here the Legislature reversed the presumption of continued occupation and emphatically and arbitrarily declares that five years' occupancy raises a presumption against the right to remove, and makes a *prima facie* case in favor of the State. Mr. Justice McKenna said that the selection of one fact as *prima facie* proof of another, makes, necessarily, the selected fact evidence the existence of the other ultimate fact, and he says there must be some rational connection between them. He further says that the requirement that this rational relation must exist, is demanded by reason and, necessarily, by the law. The Legislature has declared when a railway company has established its division points or shops at any place for five years, that this five years bears a rational relation to the question as to whether removal shall be granted by the Corporation Commission. We say that there is no rational relation between them, and that it is a waste of the time of this Court to argue that five years' occupation by the railway company of a given place for shops and division points, has anything, even remotely, to do with the question as to whether or not, under all the circumstances of the case, a railway company has a right to remove such division points or shops.

We, therefore, respectfully submit to the Court with-

out extending this argument, that the arbitrary period of five years, as fixed by the Legislature in this statute, has no rational relation to the question as to whether or not the railway company shall be permitted to remove. Having no such rational relation, the statute must fall.

The four points which we have discussed in the foregoing argument, raise questions which are neither technical nor frivolous. There has never been a time or a case in the history of this Court when propositions like the foregoing have not received its most careful consideration, because, as said by Mr. Justice Brewer for this Court in the case cited above, no duty is more pressing upon this great Court of last resort than to see that the equal protection of the laws and due process of law shall be maintained throughout this Union. If a police regulation is arbitrary, oppressive or capricious, not traceable to any known source of police power for the public welfare in some way, it offends against the Constitution. If, in the exercise of the police power, the Legislature has made an artificial and unreasonable classification, thereby giving to some persons in one class rights and privileges not accorded to persons in the same class, such exercise of power offends against the Constitution. If the Legislature, in the pretended exercise of its police power, arbitrarily selects one fact as *prima facie* evidence of another fact, thereby changing the ordinary rules of evidence common to all citizens, such accepted fact must bear a rational relation to the fact to be proved,

and if it does not, this offends against the Constitution. It is not often that a State statute is open to all these objections. It is clear, from a consideration of this whole record, that this statute was passed hastily and without due consideration, and to meet conditions such as the Legislature thought existed at Sapulpa. The statute was passed while the Sapulpa litigation, before the Corporation Commission, was pending. Proof had been made at the hearing before the Commission by the inhabitants of Sapulpa, as shown by this record, that West Tulsa, the place to which the railway company desired to remove its shops from Sapulpa, was unsanitary, and it is fair to assume that this very litigation, and the facts there proved, influenced the passage of the statute now under consideration. It cannot be said that if the Legislature had in view when it passed such statute, the purpose of protecting the inhabitants of the particular town in question, who had built and acquired property with reference to the location of division points and shops, that this was a purpose justifying the exercise of the police power, because the inhabitants of a particular town cannot possibly have any vested right in the continued occupation of certain portions of the town by a railway company for shops or for the establishment of division points.

The Supreme Court of Oklahoma has frequently held that the increase or decrease in property value caused by change of location or abandonment of depots, yards, shops

and other facilities, are not matters which can be considered as affecting, in any way, the right to make such changes; that public convenience, sufficient accommodations and sufficient facilities, as those terms must be used with relation to the requirements of a public service corporation, mean conveniences, etc., *with relation to the business of a common carrier on the part of the railroad-using public.*

In *St. Louis, Iron Mountain & Southern Ry. Co.* v. *State*, 31 Okla. 509, 122 Pac. 217, Justice Dunn, speaking for the Court, said in the body of the opinion:

> "Railroad depots and their locations are public facilities for the use and convenience of the people having business to transact with the companies and the wishes of other people or the fact that they purchased property in reference to the location of the depot is absolutely of no consequence whatsoever in locating or relocating it. No property owner can acquire a vested right in the location of a depot, and as these considerations were the primary ones affecting the action of the Commission in this instance, and not being competent to be considered, they must be eliminated from the case, leaving alone what the Commission concedes should outweigh any others advanced."

Again in *Wharton* v. *Miller*, 33 Okla. 771, Mr. Justice Williams, now Federal Judge of the Eastern District of Oklahoma, speaking for the Oklahoma Court, said:

> "The fact that the construction and maintenance of the station at W. may have the consequential or incidental effect of building a town at that point and retarding the growth of adjacent towns at stations B. and M., and thereby causing the depreciation of prop-

> erty located in said towns, is not a sufficient legal reason for parties interested in property located in either B. or M. to complain at the parties residing at W. being afforded all reasonable facilities, conveniences and services as patrons of such public service corporation at said station."

Again in *Missouri, O. & G. Ry. Co.* v. *State*, 53 Okla. 341, 156 Pac. 1155, Chief Justice Kane, speaking for the Court, said:

> "The location of a railway station, of course, belongs to the public duties of the Commission, when the question is, whether its location at a certain point is for the benefit and interest of the traveling or railroad-using public. If, however, these considerations are ignored, or, if considered, are held to be subordinate, and other elements are considered as paramount, which are aside from either the public duty or the interest of the traveling or railroad-using public, or the necessities of the operation of the railroad, then an order made with the latter for a basis must be held to be unreasonable and without legal sanction."

And this we claim is the real "meat in the cocoanut." An inspection of this statute and the circumstances surrounding its passage discloses that the Legislature did not have in mind, when it enacted such statute, the question of service to the patrons of the railroad, the shipper and the traveler; that it did not have in mind the welfare of such people who had business with the railroad; that it did not have in mind the welfare of the employes of the railroad so far as the right to remove was concerned, but must have had in mind, in a large degree, the rights of the inhabitants of the town, in a property sense, which can never be taken

into consideration, as shown by the Oklahoma cases above cited, as a basis for denying removal of division points, etc.

Respectfully submitted,

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